







Digitized by the Internet Archive  
in 2008 with funding from  
Microsoft Corporation

# INTERNATIONAL LAW

## HAVING PARTICULAR REFERENCE TO THE LAWS *of* WAR ON LAND

---

A COURSE OF TWELVE LECTURES  
DELIVERED TO THE STAFF CLASS  
OF THE ARMY SERVICE SCHOOLS

BY

LIEUTENANT COLONEL J. B. PORTER,

JUDGE ADVOCATE U. S. ARMY  
SENIOR INSTRUCTOR DEPARTMENT OF LAW

---

These Lectures are Based on Notes of  
Lectures by M. Louis Renault of  
the Institut de France, Profes-  
sor of International Law at  
the Ecole Superieure  
de Guerre .



---

Second (Revised) Edition with Appendix

FORT LEAVENWORTH, KANSAS.  
PRESS OF THE ARMY SERVICE SCHOOLS

1914

JX4511  
.P7

TO VINI  
AMPROLIAO

# I N D E X

---

<b>A</b>	
<b>ADMINISTRATION OF JUSTICE IN OCCUPIED TERRITORY</b>	
Economic measures which occupant may take,....	192
How administered,.....	189
How to be rendered,.....	190
Jurisdiction of occupant,.....	191
 <b>AERONAUTS</b>	
Question of being spies,.....	107
 <b>AID SOCIETIES</b>	
Assisting belligerent,.....	139
Conditions for cooperation with sanitary service, ..	135
Domestic question of organization of, .....	134
Personnel of, assimilated to official personnel, ...	133
Position of, .....	137
Respect for matériel of, .....	145
 <b>ALABAMA CASE</b>	
Explanation of, .....	34
 <b>ALLIANCE</b>	
Treaties of, .....	57
 <b>AMBASSADORS</b>	
Precedence of,.....	12, 17
 <b>AMERICAN NATIONAL RED CROSS</b>	
Officer of medical corps to take charge of, .....	138
Origin of, .....	124
Organization of, .....	134
President authorized to accept services of, .....	136
 <b>ARBITRATION</b>	
Definition of, .....	33
Organization of, .....	35
Permanent court of, .....	36

## **ARMISTICE**

Definition of, .....	169
Effects of, .....	173
Length of, .....	171
Matter of revictualing during, .....	174
Scope of, .....	172
To be published immediately on agreement for, ..	171
Violation of, .....	176

## **ARRANGEMENTS BETWEEN NATIONS**

Defined, .....	4
----------------	---

## **ASSASSINATION**

Defined, .....	99
----------------	----

## **ASSAULT**

Defined, .....	98
----------------	----

## **ASSIMILATION**

Of personnel of aid societies to official personnel, ..	133
---	-----

## **B**ALLOONS

Projectiles thrown from, .....	88
--------------------------------	----

## **BARBAROUS METHODS**

Definition of, .....	86
----------------------	----

## **BELLIGERENTS**

Belligerents and enemies in general, .....	74
Belligerent nationals, interests of, .....	57
Convention between and municipalities, .....	182
Conventions which may arise between, .....	156
Methods of communication between, .....	153
Relation of, with population of enemy's territory, ..	176
Who are belligerents, .....	75

## **BLOCKADES**

Must be effective, .....	5
Peaceful blockades, .....	42

## **BOMBARDMENT**

Question of legality, .....	95
-----------------------------	----

## **BOOTY**

Distinction between booty and pillage, .....	205
--	-----

## **BRUSSELS**

Conference of (1874), .....	6, 71
-----------------------------	-------



## BUILDINGS

Subject to the laws of war, ..... 145

## BULLETS

Explosive and expansive, ..... 86

## CALLS AND COUNTERSIGNS OF ENEMY

Use of, ..... 103

## CAPITULATIONS

Definition of, ..... 160

In the open field, ..... 165

Object of, ..... 165

Of a stronghold, ..... 162

Ratification of, ..... 166

Violations of, ..... 168

## CHARGE D'AFFAIRS

Definition of, ..... 17

## CHEMULPO

Discussion of affair of, ..... 64

## CHINA EXPEDITION OF 1900

Discussion of, ..... 43

## CIVIL WAR

Definition of, ..... 48

## CITY

Method of reducing a, ..... 93

What city may be attacked, ..... 91

## CLASSIFICATION

Of states, ..... 12

Of wars, ..... 46

## CODIFICATION

Of laws of war, ..... 4

## COLONIAL CONTINGENTS

Employment of, ..... 76

## COMBATANTS, FREE

Definition of, ..... 76

## COMMISSION OF INQUIRY, INTERNATIONAL

Purpose of, ..... 39

## CONFEDERATION

Germanic, .....	19
North German, .....	20
Of states, .....	19
Status of in war, .....	57
Swiss, .....	24

## CONFERENCE OF BRUSSELS

Attempt by, to codify laws of war, .....	6
To determine basis for laws of war, .....	71

## CONFERENCE OF LONDON, NAVAL, 1908

Purpose of, .....	8
-------------------	---

## CONQUEST

Occupation and conquest .....	185
-------------------------------	-----

## CONSUL GENERAL

Status of, .....	18
------------------	----

## CONSULS

In non-Christian countries, .....	11
Status of, .....	17

## CONTINGENTS

Colonial, Employment of, .....	76
Foreign, .....	75

## CONTRIBUTIONS

Definition of, .....	218
----------------------	-----

## CONTRIBUTIONS OF WAR

Collection of, .....	232
Definition of, .....	229
Origin of, .....	229
When legitimate, .....	229

## CONVENTIONS

Armistice is a semi-political convention, .....	169
Between belligerent and municipality, .....	182
Convention is a treaty, .....	9
The Hague Convention, 1899, .....	72
Geneva Convention, 1864, .....	70, 125
Geneva Convention, 1868, .....	6
Geneva Convention, 1906, .....	70, 196
London Convention, 1908, .....	39
Which may arise between belligerents, .....	156

## CONVOYS

Personnel and materiel of, .....	147
----------------------------------	-----

## COUNTERSIGN OF ENEMY

Use of, ..... 103

## CUSTOM

Definition of, ..... 3

## DECLARATION

Definition of, ..... 4

Of London, 1909, ..... 39

Of Paris, 1856, ..... 4, 70

Of St. Petersburg, 1868, ..... 6, 70

Of war, ..... 50

## DEFENSIVE WAR

Definition of, ..... 46

## DELAY OF ENEMY'S MERCHANT SHIPS

A matter of grace, ..... 65

## DELETERIOUS GASES

Projectiles containing, ..... 89

## DESTRUCTION

Useless destruction, ..... 91

## DIFFERENCES, INTERNATIONAL

Causes of, ..... 24

## DIFFERENT FORMS OF STATE

Explained, ..... 16

## DIPLOMATIC AGENTS

Precedence of, ..... 12

## DIPLOMATIC RELATIONS

Rupture of, ..... 56

## DIRECT NEGOTIATIONS

Definition of, ..... 26

## EFFECTS OF WAR

On property, ..... 195

On treaties previously concluded, ..... 59

What they are, ..... 55

## EGYPT

Peculiar situation of, ..... 15

## EMBARGO

Definition of, ..... 42

EMPIRE, GERMAN	
Constitution of, .....	21
ENEMIES	
And belligerents in general, .....	74
Uniforms and flags, use of, .....	102
ENFORCEMENT OF LAWS OF WAR	
Rules for, .....	242
ESCAPE	
Of prisoners of war, .....	115
ESPIONAGE	
Definition of, .....	105
Characteristics of, .....	106
Judicial aspect of, .....	109
EUROPEAN LAW OF NATIONS	
Definition of, .....	10
EXPANSIVE AND EXPLOSIVE BULLETS	
Use of, .....	86
EXPEDITION TO CHINA (1900)	
Discussion of, .....	43
EXPLOSIVE AND EXPANSIVE BULLETS	
Use of, .....	86
<b>F</b> ALSE NEWS	
The spreading of, .....	103
FEDERATION	
Definition of, .....	19
FIRST PEACE CONFERENCE	
The Hague, 1899, .....	6
FLAGS OF ENEMY	
Use of, .....	102
FLAGS OF TRUCE	
Procedure of, .....	153
FOREIGN CONTINGENTS	
Employment of, .....	75
FREE COMBATANTS	
Definition of, .....	76

## GENERAL ORDERS 100

Quoted, ..... 5, 9, 67, 189, 225

## GENEVA CONFERENCE

Private 1863, ..... 124

## GENEVA CONVENTION

Of 1864, ..... 70, 125

Of 1868, ..... 6

Of 1906, ..... 70, 196

## GERMAN EMPIRE

Constitution of, ..... 21

## GERMANIC CONFEDERATION

Origination and organization, ..... 19

## GOOD OFFICES

Definition of, ..... 29

## HAGUE CONVENTION

First Peace Conference of 1899, ..... 6, 72

Rules annexed to, ..... 74

Rules governing occupation, ..... 186

Second Peace Conference of 1907, ..... 7

## HERALDIC EMBLEMS

Of Red Cross, ..... 148

Precaution against abuse of, ..... 150

## HOSPITALS

Respect for materiel of civil hospitals, ..... 145

Question of flags for, ..... 151

## HOSPITAL PERSONNEL

Protection of, ..... 152

## HOSTILITIES

Notice of, ..... 53

Subdivided under two heads, ..... 74

What they may consist of, ..... 85

## HULL INCIDENT

Reference to, ..... 40

## INDEMNITY

Right of, by sufferers of loss, ..... 240

INSURRECTION	
In occupied territory,.....	186
INTERNATIONAL COMMISSION OF INQUIRY	
Purpose of, .....	39
INTERNATIONAL COMMITTEE OF GENEVA	
Rôle of,.....	136
INTERNATIONAL CONVENTIONS	
Definition of, .....	157
INTERNATIONAL DIFFERENCES	
Causes of,.....	24
Consequences of, .....	25
Settlement of, .....	25
INTERNATIONAL DISPUTES	
Violent results of,.....	41
INTERNATIONAL LAW	
Definition of,.....	1
Institute of (Oxford 1880), .....	6
Origin of rules of,.....	3
INTERNATIONAL PRIZE COURT	
Purpose, etc., of,.....	38
INSURRECTION	
Procedure of inciting, .....	100
INTERESTS OF BELLIGERENT NATIONALS	
Discussion of, .....	57
INVESTMENT	
Means of reducing a city, .....	93
<b>J</b> US GENTIUM	
Definition of,.....	1
<b>L</b> AW INTERNATIONAL	
Definition of,.....	1
<b>L</b> AW, MUNICIPAL	
Definition of,.....	3
<b>L</b> AW, NATURAL	
Definition of,.....	1



<b>LAW, POSITIVE</b>	
Definition of, .....	1
<b>LAW, PRIVATE</b>	
Definition of, .....	2
<b>LAW, PUBLIC</b>	
Definition of, .....	1
<b>LAW OF NATIONS</b>	
European, .....	10
<b>LAWS OF WAR</b>	
Buildings and materials subject to, .....	145
Codification of, .....	4
Definition of, .....	66
On land, .....	3
Rules for enforcement of, .....	242
<b>LEGISLATION</b>	
Applicable to occupied territory, .....	188
<b>LEVEES EN MASSE</b>	
Definition of, .....	83
<b>LIEBER, FRANCIS</b>	
Prepares General Orders 100, .....	67
<b>LONDON CONVENTION</b>	
Of 1908, .....	39
<b>LONDON DECLARATION</b>	
Of 1909 .....	39
<b>LONDON NAVAL CONFERENCE</b>	
Of 1908, .....	8
<b>MARITIME WAR</b>	
Volunteers in, .....	80
<b>MARTIAL LAW</b>	
Definition of, .....	189
<b>MATÉRIEL</b>	
Of fixed sanitary establishments, .....	144
Of sanitary formations, .....	144
Position of, of convoys of evacuation, .....	147
Receipt for, of civil hospitals and of aid societies..	145

## MEDIATION

Definition of, .....	29
----------------------	----

## MERCHANT SHIPS

Delay for enemy, .....	65
------------------------	----

## MESSENGERS

May they be treated as spies? .....	107
-------------------------------------	-----

## METHODS, BARBAROUS

Bounds which must not be passed, .....	86
--	----

## METHODS OF REDUCING A CITY

Definition of, .....	93
----------------------	----

## MILITARY CONVENTIONS

Definition of, .....	158
----------------------	-----

Suspension of arms, .....	169
---------------------------	-----

## MILITARY OCCUPATION

Administration of justice in occupied territory, ...	189
--	-----

As a war measure, .....	180
-------------------------	-----

By way of guaranty, .....	180
---------------------------	-----

Definition of, .....	177
----------------------	-----

Economic and administrative measures an occupant may take, .....	192
--	-----

Insurrection in occupied territory, .....	186
---	-----

Invader occupies but does not acquire real property, .....	196
--	-----

Legal rights of occupying power, .....	178
--	-----

Legislation applicable to occupied territory, .....	188
---	-----

Local jurisdiction, .....	189
---------------------------	-----

Notification of, .....	186
------------------------	-----

Occupation and conquest, .....	185
--------------------------------	-----

Policy of occupant in occupied territory, .....	197
---	-----

Personal property rights under, .....	198
---------------------------------------	-----

Relations between occupant and occupied country, .....	187
--	-----

Right of occupant to collect taxes, .....	192
---	-----

Rules of The Hague governing, .....	186
-------------------------------------	-----

When is there military occupation, .....	185
--	-----

## MINISTERS

Definition of, .....	12
----------------------	----

## MIXED COMMISSIONS

Constitution of, .....	28
------------------------	----

## MONROE DOCTRINE

Discussed, .....	13
------------------	----

MOYNIER, GUSTAVE	
President of 1st Red Cross Society, .....	124, 136
MUNICIPALITIES	
Conventions between belligerent and, .....	182
MUNICIPAL LAWS	
Definition of, .....	3
NATION	
Definition of, .....	2
Means State, .....	3
NATIONAL FLAGS	
Red Cross to be accompanied by, .....	151
NATIONALS	
Established in enemy's country, .....	61
NATURAL LAW	
Definition of, .....	1
NAVAL CONFERENCE	
Of London in 1908, .....	8
NEGOTIATIONS, DIRECT	
Definition of, .....	26
NEUTRALITY	
Status of, .....	56
NEUTRALIZED STATES	
Definition of, .....	49
NON-CHRISTIAN COUNTRIES	
Distinction between Christian and, .....	10
Consuls in, .....	11
NORTH GERMAN CONFEDERATION	
Origin and organization, .....	20
NOTICE OF HOSTILITIES	
Whether or not to be given, .....	53
OCCUPATION	
See Military Occupation, .....	
OFFENSIVE WAR	
Definition of, .....	46

OFFICIAL RELATIONS	
Breaking off, .....	56
ORGANIZATION OF ARBITRATION	
Discussion of, .....	35
ORIGIN OF RULES	
Of International Law, .....	3
PARIS, DECLARATION OF	
Of 1856, .....	4, 70
PARLEMENTAIRES	
Cause of arrest of, .....	156
Definition of, .....	153
PAROLE	
Definition of, .....	116
PAY	
Of sanitary personal while with enemy, .....	143
PEACE CONFERENCE	
Name of, misleading, .....	35
PEACEFUL BLOCKADE	
Defined, .....	42
PERFIDIOUS METHODS	
Classification of, .....	99
PERMANENT COURT OF ARBITRATION	
Does not in reality exist .....	36
PERSONAL UNION	
Definition of, .....	16
PERSONNEL	
Of aid societies assimilated to official personnel, ..	133
Sanitary, .....	131
PERSONS	
Situation of, in war, .....	61
PILLAGE	
Definition of, .....	98
Distinction between booty and pillage, .....	205
POSITIVE LAW	
Definition of, .....	1

## PRECEDENCE

Of diplomatic agents, .....	12
-----------------------------	----

## PRISONERS OF WAR

Assistance for, .....	119
Escape of, .....	115
Exchange of, .....	121
General conditions of, .....	113
Historical facts, .....	112
Information in regard to, .....	119
Repatriation of, .....	121
Succor for, .....	119
Work of, .....	115

## PRIVATE LAW

Definition of, .....	2
----------------------	---

## PRIZE COURT, INTERNATIONAL

Establishment of, .....	38
-------------------------	----

## PRIZE MONEY

Reforms necessary in system of, .....	217
Regulations governing, .....	208

## PRIZES

French regulations governing, .....	207
-------------------------------------	-----

## PROJECTILES

Employment of, containing gases, .....	89
Thrown from balloons, .....	88

## PROPERTY

Confiscation of, .....	64
Difference between war at sea and on land in re to private property .....	214
Effect of war on, .....	195
Invader occupies but does not acquire real property	196
In war, .....	64
Policy of occupant in occupied territory respecting	197
Personal property rights in occupied territory, ....	198
Private property to be respected in war, .....	210

## PROTECTORATE

Status of in war, .....	58
-------------------------	----

## PUBLIC LAW

Definition of, .....	1
----------------------	---

<b>QUARTER</b>	
Refusal of, .....	90
<b>RAILROADS IN WAR</b>	
Commercial use of by occupant, .....	239
Exploitation of, .....	235
Importance of, .....	234
Rights of belligerent over, .....	236
Rights of occupant in re stations, rolling stock, etc., .....	237
Rolling stock of neutral states, .....	239
The right of way, .....	236
<b>RED CROSS</b>	
Flag to be accompanied by national flag, .....	151
Heraldic emblem of, .....	148
Repression of abuses of insignia, .....	152
Use of emblem of .....	138
<b>RED CROSS SOCIETIES</b>	
Origin of, .....	124
<b>REDUCING A CITY</b>	
Methods of, .....	93
<b>REFUSAL OF QUARTER</b>	
The Hague declares it improper, .....	90
<b>REPRISALS</b>	
Are acts of violence, .....	41
Definition of, .....	244
<b>REQUISITIONS</b>	
Authorities to whom they should be addressed, ...	223
Authority for, created by law and regulations, ...	226
Definition of, .....	218
Form in which to be exercised, .....	223
Limits to right of, .....	220
Of things, .....	219
Order of, .....	223
Receipts for, .....	223
Right of, .....	223
<b>RETORSION</b>	
Definition of, .....	41
<b>REVICTUALING</b>	
During an armistice, .....	174



ROUSSEAU, J. J.	
His principles as to rights of war, .....	66
RULES	
Annexed to The Hague Convention, .....	74
RUPTURE OF DIPLOMATIC RELATIONS	
Defined and discussed, .....	56
RUSES	
Are admissable by rules of The Hague Conference, 101	
SAFE CONDUCTS	
Definition of, .....	159
SAFEGUARDS	
Definition of, .....	159
Distinction between dead and live safeguard .....	160
ST. PETERSBURG	
Declaration of in 1868, .....	6, 70
SANITARY ESTABLISHMENTS	
Formation of, .....	128
Matériel of fixed, .....	144
Respect and protection due to, .....	129
SANITARY MATÉRIEL	
Subject to laws of war, .....	204
SANITARY PERSONNEL	
Definition of which may not be taken prisoner, ...	131
In power of enemy, .....	140
Pay of while with enemy, .....	143
SECOND HAGUE CONFERENCE	
In 1907, .....	7, 37
SEMI-SOVEREIGN STATES	
Definition of, .....	14
SICK AND WOUNDED	
Treatment of in hands of enemy, .....	123
SIEGE WARFARE	
What cities may be attacked, .....	91
SITUATION OF PERSONS	
In war, .....	61

SOVEREIGN STATES	
Definition of, .....	13
SPIES	
Definition of, .....	105
STATE	
Definition of, .....	2
STATES	
Classification of, .....	12
Different forms of, .....	16
Semi-sovereign, .....	14
Sovereign, .....	13
Vassal, .....	14
STATES, NEUTRALIZED	
Definition of, .....	49
STATES OF THE UNION	
International standing of, .....	23
STATES, PROTECTED	
Definition of, .....	49
STATES, VASSAL	
Definition of, .....	14, 49
Status of in war .....	58
STATUS OF NEUTRALITY	
Definition of, .....	56
SUSPENSION OF ARMS	
Essentially a military convention, .....	169
SWISS CONFEDERATION	
Discussion of, .....	24
TAXES	
Right of occupant to collect, .....	192
TREASON	
Definition of, .....	101
TREATIES	
Are conventions, .....	9
Definition of, .....	157
Effect of war on previously concluded, .....	59
How made in United States, .....	157
Of alliance, .....	57

## TREATY OF PEACE

Between Peru and Chile,.....	170
May take character of truce,.....	170

## TRENT AFFAIR

Discussed, .....	27
------------------	----

## TRUCE

Definition of,.....	169
Treaty of peace may take character of,.....	170

## TRUE UNION

States are a unit in, .....	16
-----------------------------	----

## ULTIMATUM

Definition of,.....	52
---------------------	----

## UNIFORMS OF ENEMY

Use of,.....	102
--------------	-----

## UNION, PERSONAL

Definition of,.....	16
Status of in war, .....	57

## UNION, TRUE

Definition of, .....	16
----------------------	----

## UNITED STATES OF AMERICA

Discussion of,.....	22
---------------------	----

## USELESS DESTRUCTION

To be forbidden in war,.....	91
------------------------------	----

## VASSAL STATES

Definition of, .....	14, 49
Status of in war, .....	58

## VATICAN

Discussion of as a state,.....	18
--------------------------------	----

## VIOLATION OF ARMISTICE

Discussion of,.....	176
---------------------	-----

## VIOLENT RESULTS OF INTERNATIONAL DISPUTES

What they consist in.....	41
---------------------------	----

## VOLUNTEERS

In maritime war, .....	80
------------------------	----

# WAR

At sea,.....	47
Civil, definition of,.....	48
Classification of,.....	46
Declaration of,.....	50
Defensive,.....	46
Definition of,.....	44
Just and unjust,.....	47
Laws of,.....	66
On Land,.....	47
Offensive,.....	46
Properly so-called,.....	48
Purpose of,.....	45
Who has the right to make,.....	48

## WARFARE, SIEGE

Definition of what cities may be attacked,.....	91
---	----

## WAR TRAITOR

Definition of,.....	111
---------------------	-----

## WOUNDED AND SICK

Treatment of, in hands of enemy,.....	123
---------------------------------------	-----

# Lectures on International Law, Having Particular Reference to the Laws of War on Land

Based on notes of lectures delivered by  
Prof. Renault, of the Institut de France

## FIRST LECTURE

Gentlemen of the Staff College:

THESE lectures will have for their main purpose to place before you the laws of war on land.

The subject is a branch of international law, and the most important branch for the study of military men.

International law is the modern and accepted definition of *jus gentium*—the law of nations, a form of expression still used in Germany as “Völkerrecht.” The modern and better name of “International law,” i.e., “the law between nations,” is believed to have had its inception at the end of the XVIII century when Bentham so translated the title of an old work, “*de jure inter gentes*,” and it certainly describes the law better than does the older term.

In the study of international law, a division has sometimes been made between the natural law and the positive law; the former comprises the law as it ought to be, and the latter the law as it actually is, under present conditions; or I might say the former is the theoretical, altruistic law, and the latter the practical law under which the nations meet.

There is also another division of international law—the public law which regulates conditions be-

tween states, and the private law which regulates questions between private persons of different nationalities.

It is with the positive and public law that we have to do in these lectures.

When in international law we speak of a *nation* we use the word as being synonymous with *state*—a political unit of greater or lesser extent.

While the colloquial use of the word "nation" is also the one I have just outlined, its meaning may not always be that of a state. While a state is a unit obedient to a single authority, which to the world at large represents a whole, a nation may mean a grouping of men having the same tongue, the same customs, the same aspirations, and, usually, a common origin. Sometimes in such cases the nation and the state are the same; such is the case with France. Sometimes, as the result of political or historical events, a nation is divided among several states; this is the case with the Polish nation. Italy for a long time was a nation divided up into a number of states, and today, Italy, in order to complete her national entity, claims from Austria, territory situated around Trieste and known to patriotic Italians as "*Italia irredenta*." In the Austrian Empire we have the converse of this proposition, as Hungary claims to be a nation united with other nations and parts of nations in the state of Austria-Hungary.

The national feeling, though usually purely sentimental, is apt to be a very strong one, and frequently is derived, as I have stated, not so much from the fact of a common unity at some prior time as from a common origin of race. The troubles in the Balkans are largely sustained by the interest which Russia maintains in the Slavic race. So, too, there can be no doubt that in the United States there is in the heart of many of the people an affinity for



England, which is not felt for other countries, due to the common origin of the two states, their common language and ideas. It is this national feeling which today binds to England her great autonomous colonies such as Canada, those in Australia, etc. A common Teutonic origin and language has also been the strongest factor in establishing the present German Empire.

It is in the sense of a state that the word nation will be used hereafter in these lectures.

### **Origin of the Rules of International Law**

The ordinary or municipal rules of law are established by the supreme law-making authority of a state and are binding upon all who owe allegiance to that state. As between states, however, each being sovereign, there is no mutual law-making authority and no common superior. It is thus obvious that municipal laws and international laws must originate in an entirely different manner. Municipal laws are imposed by a state upon itself; international laws are the result of common consent between states.

This consent may be shown in two ways:

*First*, by express agreements in writing.

*Second*, by accepted custom.

In the second case we have something analogous to what in English speaking countries, we call the common law.

Many rules of International Law have no other basis than custom. Such for instance is the inviolability of diplomatic agents and the fact that they are not amenable to the tribunals of the foreign country where they may be. Until very recent years the laws of war on land were purely matters of custom, we may take the respect due to a flag of truce as an example. Belligerents observed certain rules and abstained from certain acts and the customs so

arising gradually became crystallized. Where a custom is general in its observance it may be taken as truly representing the interests of all, whereas a formal convention may be imposed by the strong on the weak and may only really represent the interests of some one party.

Rules maintained by custom, however, are not always satisfactory, they are hard to prove, since they are not in writing. They are sometimes vague and lack precision and there is no certainty that they will be observed by an adversary.

For the last sixty years the evolution of ideas has pointed to a determined codification of the laws of war which would transfer the law of custom into a positive written law. The advantage of this was manifest but its execution demanded distinct agreements among the nations. Such agreements may take different names; the most usual is that of "convention" (an agreement between two or more parties, individuals or states, to evidence reciprocal obligations), the terms "declarations" or "arrangement" are also used, the term made use of, however, is of little importance.

1st. The Declaration of Paris, (16th of April, 1856), may be considered as the point of departure for the evolution.

Plenipotentiaries met in congress in Paris at the end of the Crimean War. The war had, from a naval standpoint, presented the somewhat singular spectacle of two powers—France and England—which had long been enemies and had upheld different principles, in regard to maritime war, becoming allies and for the time being obliged to concert their divergent practices. The rules on which these two nations had agreed provisionally and on which they acted as a *modus vivendi* during the war, served as the basis of the Declaration of Paris.

The declaration was signed by the representatives of the then five great powers (France, England, Russia, Prussia and Austria), and later by Turkey and Sardinia who, during the war, had appeared as belligerents. The declaration was to be brought to the attention of the other states, who were invited to adhere to it. This was the method employed at that period.

The rules were accepted by almost all the powers. (They were not, however submitted to Japan, which at that period did not enjoy the normal relations of a recognized power. But since 1886 Japan has spontaneously accepted them.)

The declaration contained four rules:

- a. Privateering is and remains abolished.
- b. The neutral flag covers the enemy's goods, except contraband of war.
- c. Neutral goods, except contraband of war, are not liable to capture under the enemy's flag.
- d. Blockades, to be binding, must be effective.

The United States declined to accede to the declaration as a whole. Its small naval force forbade its relinquishing the right to employ privateers in time of war. It was held, however, that all the rules or none must be subscribed to. If a rule could have been adopted exempting all private property from capture at sea in time of war, the United States, would gladly have acceded. Without the incentive of private goods to be captured there would be no privateering.

2d. In 1863, there was published to the Army of the United States, General Orders 100, "Instructions for the Government of Armies of the United States in the Field." These instructions were prepared by Dr. Francis Lieber, and form a complete code of the laws of war. They had of course no international force and were entirely unilateral in that they instructed our army alone as to its duties.

Nevertheless it was the first code of its kind and virtually represents the law today as clearly as it did fifty years ago. Some European jurists appear to have minimized the value of Dr. Lieber's work. From this statement we must pointedly exempt, however, the learned Dr. Bluntschli who deemed the code to have the highest merit and incorporated it *in extenso* in his "Völkerrecht." Both in his writings and in conversation Dr. Bluntschli did not hesitate to maintain that General Orders 100 must serve as the foundation for the codified laws of war.

3d. We come next to the Convention of Geneva, of August 22, 1864, which regulates the disposition of the sick and wounded on the field. The powers came to this convention in greater number, and the convention has been successively accepted by almost all the countries in the world.

4th. Then came, in 1868, the Declaration of St. Petersburg relative to the prohibition of the use of certain explosive projectiles.

5th. In 1874, at Brussels, an attempt was made to codify the laws of war on land. (The effort was made on the initiative of Russia, and, as a compliment to that initiative, notwithstanding the custom under which a delegate from the country in which the conference is held is usually made president thereof, the presidency of the meeting was given to the Russian delegate, son of the celebrated Jomini.) This conference resulted only in a project. As an outcome, however, of the Brussels Conference, the Institute of International Law, which met at Oxford in 1880, prepared and recommended to the nations for adoption a code of laws for war on land. This code presented certain features which were not acceptable and it was not adopted.

6th. In 1899 took place the First Peace Conference. The method had changed. Instead of the

most important states determining on the rules and later submitting them to the other powers, an invitation was extended to the greatest possible number of states, and in 1899 there were twenty-six states represented at The Hague. (The number twenty-six resulted from the fact that only those powers having representatives at St. Petersburg were invited. This explains why several of the South American states were not represented.)

A convention of importance for the laws and customs of war on land was adopted. The Brussels project was revised. Certain specific declarations were made, among others, those in regard to the use of asphyxiating projectiles and against certain forms of bullets. The conventions were open, other states having the right to join.

7th. A full development was reached in 1907, at the Second Peace Conference, where they were delegates from forty-four states out of the forty-six which had been invited to send representatives.

There is clearly a broad and liberal view in this appeal to the deliberation of all, and one might suppose that a rule on which they agreed was the desire of all. But nevertheless there are difficulties.

(a) First, it is necessary that the delegates shall understand one another. At The Hague all the delegates spoke French (except the Americans who, after the French, are the most refractory race to the acquisition to foreign tongues.)\* But not all understood it after the same fashion, because of a different turn of mind. Intermediaries were necessary to translate to some the thought of others; this was the task of the French delegates.

---

\*This is a statement made by Prof. Renault, himself a delegate. I am inclined to believe the statement to be inaccurate as some of the American delegates were undoubtedly familiar with the French language.

(b) It then became necessary to create committees and sub-committees in order that the needful work might be carried out.

(c) Finally, it was necessary to overcome, in certain cases, the obstinacy which is always to be met with in these large assemblies. The small states frequently endeavor to show their independence by opposition; they must be persuaded; and their resistance must be made to disappear, for unanimity, the accord of all wills, is indispensable in these conferences; otherwise one state might see its independence threatened by a coalition of the others.

All these difficulties make deliberation very slow. At The Hague, after four months, a series of resolutions and conventions relating to war on land and sea were reached.

8th. Finally, as the last stage of the evolution, we may cite the Naval Conference at London from December, 1908, to February, 1909.

This resulted from the Second Peace Conference and was an attempt to solve certain questions for the consideration of which there had been at The Hague want of time as well as of good will. Ten powers went to London, of which eight considered themselves as great powers having important maritime interests (France, England, Russia, Germany, Austria, Italy, the United States and Japan.) It would have been unfortunate had the great powers been alone represented, since they are destined to fill the roll of belligerents, and in a naval war it is necessary to consider the rights and interests of neutrals. It was well, therefore, that the smaller powers should also be represented, as they were by Spain and Holland.

Besides this, the powers requested England to invite the countries which were not represented to accept the rules of the conference. It is probable

that the adhesion of all will be obtained. Norway, perhaps, will present some difficulty, as its feelings were hurt at not being invited to the conference, although it is the fourth ranking country in the world as to its merchant marine.

It is thus clear that there is a desire to have a positive written law governing the conduct of belligerents on land and at sea, and that the law should result from the consensus of all the nations. The great desideratum is that this consensus be permanent because the conventions may be denounced; the nations, however, have agreed that such denouncement shall not go into effect until a year after notice thereof is given, and, therefore, the denouncement of a convention a day after a declaration of war is guarded against.

Over and above the written rules and the customs now accepted by all, or practically all the nations, each country may institute regulations and give instructions to its armies, to its fleets, and to its agents. These regulations and instructions, while obligatory upon the parties and individuals belonging to the government which establishes them, have no value from the viewpoint of international law, but it may be interesting to know the rules peculiar to a given country, in order to know what guarantees may be expected of that country with respect to international law.

Of this nature are the rules contained in General Orders 100, of 1863, and the rules now contained in the Field Service Regulations of 1913. The former are binding upon the Army of the United States, except where they may come in conflict with the rules contained in a convention to which the United States is a party. It should be remembered that where a convention is entered into with one or more foreign nations by our government and is ratified as required by law, the convention is a treaty and as such as

much the law of the United States, as is any statute enacted by Congress; regulations, as we know, cease to have force when in conflict with statute law.

### **Old Distinctions of the Law of Nations**

International law now tends to become universal and to bind all the powers of the world. For a long time, however, a different idea obtained.

It seemed formerly as though international law had a local character. One spoke of the European law of nations. It is true that this law was not limited to Europe, but was also applied to the United States, an old European colony. Nor did it apply to the whole of Europe—Turkey was beyond its limits. For the latter power the situation was changed, on paper, by the Treaty of Paris, which admitted Turkey to the European concert. It would seem, however, that this unfortunate country, while technically recognized as one of the powers, has nevertheless remained the plaything of diplomacy and the recent war points to its disappearance as a factor in the councils of nations. Nevertheless, so far as war is concerned, Turkey is bound by the Geneva and The Hague Conventions.

The laws, religion and views on the conduct of affairs, which existed in Turkey—not to mention the non-European countries which recognize Turkey as their suzerain—were of so different a character from those which regulated the rest of Europe, as to place Turkey in regard to international recognition, on a different plane from the rest of the powers.

That which existed for Turkey existed also for the other countries, and it became the custom to make the distinction of Christian countries or non-Christian countries. The latter comprised, at first, those in the Levant; afterwards their number was



augmented by other states—China, Japan, etc.,—as international relations became enlarged.

The essential character of this distinction is, that in the non-Christian countries foreigners remain in a great measure under their own national authority as represented by their consuls. Nothing like this occurs in Christian countries. There, any such power in a consul would be considered as striking at the root of local territorial authority. In most of the non-Christian countries an alien was not triable by the local courts, but by a consul of his own nation.

The expression "non-Christian" has become inexact, particularly during the past fifteen years. In the extreme Orient, Japan was in the first rank of non-Christian countries. With great tenacity of purpose Japan has endeavored to rid itself of what it considered a derogation of its dignity, and since 1884 has been making treaties with other nations for the purpose of freeing itself from the old situation and of entering the regime of the common law. Its efforts, aided by its victories over China, and more recently by its war with Russia, have produced the desired result, and today Japan is within the regime of the universal law.

On the other hand, a country which, in law, is Christian—Bulgaria—is subject to an exceptional regime (the regime "des capitulations") by virtue of the Treaty of Berlin. This regime has been minimized, and, due to the fact that Bulgaria has become a kingdom, that country may invoke the common law; but the kingdom is not fully recognized and, therefore, its status is still uncertain. The position of Bulgaria will undoubtedly be greatly strengthened ultimately by the result of the recent war.

The present state is one of evolution. As countries become more and more civilized, they become more and more sensitive to attempts upon their inde-

pendence and their dignity. Thus Siam is at present making efforts to place itself under the general law.

### Of States

States may be classified as great powers, medium powers and small powers, the classification, depending today on the question of fact. In olden times the classification was made by the Pope. The Ecumenical Councils, which have been replaced by our diplomatic conferences of today, were composed not only of ecclesiastics but also of delegates of the sovereigns who caused themselves to be represented. There were great difficulties in regard to precedence. In 1815, at the Congress of Vienna, an effort was made to officially classify states into three categories. The idea, however, was abandoned in order not to produce ill feeling. A classification was then made according to a protocol based on the recognition of the equality of all states. There was first established a hierarchy between representatives, the Ambassador being given precedence over the Minister Plenipotentiary, who in turn, had precedence over a *Chargé d'Affaires*, etc. But in a capital city there may be several Ambassadors belonging to different powers. Who precedes, who passes ahead of the other? The rule is that they rank in accordance with the order of their arrival in the country to which they are accredited. Thus, there is no classification in law, nothing which would shock the susceptibilities of anyone. (In the olden time the Papal Nuncio was, by courtesy, always the dean of the diplomatic corps in all Catholic countries).

It may be well to state here that broadly speaking an Ambassador is the personal representative of his sovereign and has the right to interview personally the sovereign to whose court he is accredited. Lesser envoys, such as Ministers, represent their

government only, and conduct their business with the government to which accredited through the Foreign Minister or through some other representative of the sovereign. For this reason, for many years the United States neither maintained nor received Ambassadors. Today the rule has been modified and the inconvenience to which the Ministers of the United States were put abroad, by being ranked by Ambassadors of the most unimportant states has led the United States to maintain Ambassadors at the capitals of the principal powers whenever these powers accredit Ambassadors to Washington.

**SOVEREIGN STATES.**—Sovereign states are those which may enter into relations with other states. *In law*, all sovereign states are equal. *As a matter of fact*, they are not. Thus, certain questions have a European character, and it is admitted they cannot be regulated without the assent of the great powers. Things which have been done by these great powers must be accepted by the others. Belgium was neutralized by the five great powers, and another country may not come and say: "I do not recognize the neutralization of Belgium, I was not a member of the Congress." Of recent years the United States has become a factor in world questions, as has Japan in matters affecting the Orient.

The position taken by the United States under what is called the Monroe Doctrine is well known. This doctrine which appears undoubtedly to have been suggested to us by the British Government, and which was aimed at certain European tendencies of the time, which it was thought might serve to reestablish monarchical conditions on the western continent, amounts today, it would seem, to a warning to the European powers that no interference by them with the affairs of the American continent will be permitted (except of course in so far as they already

have possession thereon). While the doctrine is still officially couched in language which is reminiscent of its original purpose, the practical use of the doctrine indicates the evolution which I have just mentioned. Since the United States has assumed this position it would not seem logical that it should undertake to interfere in European concerns, and yet there is a decided tendency that way, accentuated by our Asiatic interests.

**SEMI-SOVEREIGN STATES.** — In certain cases there are differences more clearly marked. There are semi-sovereign states which have not full sovereignty. That which is lacking in general to such states is their freedom in relation to external matters. Such are the protected states of Tunis, Annam, and Korea, which is actually under the protection of Japan and is no longer even represented in international conferences. It would be perhaps more in accordance with truth to say, that today, Korea has been fully annexed. As to the precise position which Tripoli will hold as a result of its recent occupation by Italy it is too early to guess. It is probable that its annexation will be complete.

**VASSAL STATES.** — Finally, there were vassal states. This expression was taken from the middle ages and, singularly enough, was employed to express the relations between countries which had never known the feudal system. Servia, Moldavia and Wallachia, were vassals of Turkey, to whom they paid tribute. This situation passed away in 1878, the principalities having become independent. The same treaty had created the principality of Bulgaria, and had declared it a vassal of the Sultan. Today the situation is changed in fact, but not in law, since a modification of the Treaty of Berlin (1878) is legal only after the acceptance thereof by the signatory powers. Bulgaria has declared its independence and its prince

has assumed the title of King, or Czar, of the Bulgars; it is probable that the conferences which must follow the recent war will grant to Bulgaria the recognition which the signatory powers of the Treaty of Berlin have heretofore refused.

Moldavia and Wallachia are now incorporated in the Kingdom of Roumania. There has been, as a result of the recent war, a recasting of the small states which have been gradually carved out of Turkey and they will receive a recognition which has heretofore been denied them. The affairs of the Balkan Peninsula are however, at present in too chaotic a state to permit one to foresee what the ultimate settlement will be.

**PECULIAR SITUATION OF EGYPT.** — A country which is a dependency of Turkey, and in regard to which there are many erroneous ideas, is Egypt. Is Egypt a state? Is it a tributary? Is it a vassal? It pays tribute, it is true, but it is in a most peculiar position.

1st. It is today, and has been for many years, in law, a privileged province, but it is bound to Turkey by very slender ties. The sovereignty of Turkey is recognized only in the form of a tribute. Once the the tribute is paid, Egypt considers itself free. Whenever Turkey has been at war with a nation, Egypt has declined to consider herself at war with that nation; in 1897 the situation appeared absurd and Greece, then at war with Turkey, withdrew her consuls from Egypt. Egypt has obtained a real emancipation since the time of the Khedive Ismail, who had caused himself to be given the right to contract loans (a right which he greatly abused), and who had acquired a certain autonomy.

2d. But along with this there is a condition of fact; since 1881 a British corps of occupation has been in Egypt. It is true that the representative of England is in a position analogous to that of the rep-

representatives of the other powers, but he also fills the roll of counselor, and besides this, there is an English adviser attached to each important ministry, and their advice is generally heeded. There is therefore, as a matter of fact, a true "influence." Added to this is the fact that an English garrison is maintained and that military affairs in Egypt are virtually in British hands. (France, which might best have disturbed this occupation, renounced, in 1904, any effort to counteract the British pretensions.)

### **Different Forms of States**

At times states present peculiar forms. Besides what I will call the simple form, constituting an indivisible whole, such as France, Italy or Spain, the following forms may present themselves.

**PERSONAL UNION.**—In the past we have seen states obeying a single sovereign while retaining their own personality. Such were England and Hanover for many years (from 1714 to 1837) prior to the accession to the British throne of Queen Victoria; so, also, were Holland and the Grand Duchy of Luxemburg prior to the accession of the present sovereign of the Netherlands. I am inclined to take the view that England and certain of her great colonies are practically states of this nature although the form of a political union is still maintained. Belgium and the Congo Free State belonged to this type. Both had for their sovereign the King of the Belgians. Since the death of the late King, however, the Congo State has passed into the possession of Belgium.

**TRUE UNION.**—In a true union, the states are a unit from the external point of view. They have the same flag, the same sovereign, and the same diplomatic representation; such is the case of Austria-Hungary. Sweden and Norway represented not long ago, an example of a true union. Recently, however,

Norway seceded from the union and is now a separate independent state with its own sovereign. While it is true that Austria-Hungary are one from an external point of view, we find in the combined nation such internal differences as to frequently threaten the principle of a true union; even the Austro-Hungarian flag is formed by uniting the flags of Austria and Hungary.

States like individuals are born, are transformed and die. The disappearance usually is the result of disturbances or of external or internal wars. The XIX Century saw the birth of Belgium and of Greece, and of recent years we have seen the birth of the Cuban and Panaman republics, and of the Kingdom of Norway as an independent political unit. The German Empire illustrates the transformation of a number of lesser powers into one of the great powers of the world. The disappearance of the Kingdom of Poland is a matter of historical interest. France was in a measure transformed by the incorporation after the war of 1870, of Alsace and of a part of Lorraine with the German Empire. Our own history shows the transformation of a large part of Mexico as the result of our war with that state. The death of the Kingdom of Hanover came in 1866.

Exterior sovereignty consists in the right of legation, that is, the right to enter into relations with other sovereign powers through permanent or temporary diplomatic agents. These agents who vary in rank from Ambassadors to plain "Chargés d'affairs" have a twofold roll; first that of executive agents and second that of what I will call observation agents; it is more particularly to the latter sphere that pertain the duties of military and naval attachés.

With these we must not, however, confound consuls, who, while also executive agents and agents of observation are not diplomatic agents and are there-

fore not entitled to the immunities which the latter enjoy. It is true that there are certain countries where the Consuls-General occupy a quasi diplomatic position, but this is by custom and force of circumstances and not by virtue of international law. In Egypt, technically a vassal of Turkey, consuls-general for many years have occupied such a status.

Exterior sovereignty may also exist as a fiction of international law. Thus the Vatican maintains legations at certain capitals and has diplomatic agents accredited to it. When in 1870 Italy took the Papal states and occupied the city of Rome, the Pope declined to acknowledge that he had ceased to be a temporal sovereign and the Italian government agreed that certain buildings in Rome and a country palace in the neighborhood thereof, should still be under the political dominion of the Pope. The latter maintains a military force and as already said has diplomatic relations with several foreign states. It may be added that this peculiar situation of the Vatican is due to the religious questions involved.

Certain states have agreed by treaty to permit outside interference with their interior sovereignty—such are Turkey and Panama. It is seldom, however, that this interference may be exercised without considerable trouble.

While in law all sovereign states are equal, in practice they are not, and we have at present an illustration of the great powers virtually dictating to the lesser powers in the Balkans what the result of their victorious war with Turkey shall be.



## SECOND LECTURE

---

### Confederation and Federation

TWO forms of political unit have played an important role in the history of the XIX century,—a confederation of states, and a federal state.

The classic example of a confederation is presented by the German states from 1815 to 1866, under the regime of the Germanic Confederation.

THE GERMANIC CONFEDERATION. — Originating in the treaty of Paris of 1814, the Germanic Confederation was organized by the Federal Pact of June 8, 1815. This pact left to each state its independence, its autonomy, and its own government, but established a general representation of the common interests, in the form of the Federal Diet, sitting at Frankfort under the presidency of Austria, and composed, not of representatives elected by popular suffrage, but of plenipotentiaries designated by the various confederated sovereigns. This diet reached decisions in regard to the handling of the common interests, and represented the confederation in its foreign relations.

Among the states, members of the confederation, were certain ones which had entered the confederation only in regard to a portion of their territory. Thus Austria in particular, left outside her Italian possessions (the kingdom of Lombardy-Venetia). The Low Countries were in the confederation only for the Grand Duchies of Luxemburg and Limburg; Denmark, for the Duchies of Schleswig and Holstein; Prussia left out the Duchy of Posen and the hereditary provinces. The Federal pact was appli-

cable only to territory comprised within the confederation. Thus, when in 1859 Austria was at war with Piedmont allied to France, the Confederation could remain neutral even though Austria was its principal member.

The Germanic Confederation was an international person, represented by the diet, having the right to send and to receive diplomatic agents; as a matter of fact, the confederation exercised its right of legation only in a passive form. While there were permanent legations accredited to the diet at Frankfort by the foreign powers, it was only the exception when the diet exercised the right of legation in its active form.

The confederated states had retained intact their interior sovereignty and had not individually ceased to be persons from the standpoint of international law.

Such is the political system to which the German states were subject from 1815 on. But Prussia was endeavoring to supplant Austria in the direction of the affairs of these states, and the latent rivalry existing between the two powers took on, in 1860, an accentuated form. The conflict had its outcome in 1866 when Austria, vanquished at Königgrätz was forced to accept the Peace of Prague, which dissolved the Germanic Confederation and announced a reconstitution thereof on a new basis of an association of the German states.

**NORTH GERMAN CONFEDERATION**—The Germanic Confederation was replaced by the Confederation of North Germany, under the hegemony of Prussia (Constitution of April 16, 1867).

This new association no longer comprised Austria or the German states south of the Main (Bavaria, Wurtemberg, Baden, Hesse-Darmstadt), but only the states north of that river, of which the most import-

ant was Prussia, enlarged since the Austrian War by the addition of Hanover, Electoral Hesse (Hesse-Cassel), Nassau and Frankfort. But if the number of the states which were members of the new confederation was less than under the older system, the ties which bound them were much stronger.

The presidency belonged to Prussia; the King of Prussia became the supreme chief of the army; other services of common interest (navy, customs, etc.) were united; and, finally, the federal representation was made up of two bodies, the Federal Council, corresponding to the old Diet, and the Reichstag, elected by universal suffrage; the concurrence of these two bodies being necessary for the enactment of federal laws.

On the other hand, since, in order not to arouse the susceptibilities of certain foreign powers, the southern states were left outside of the North German Confederation, diplomacy had charged itself with the duty of attaching them thereto on the military side, by treaties of alliance. A great error, therefore, was committed by France in believing that Germany was less strong after Königsgrätz. The war of 1870 gave Germany the opportunity to conclude the political unity commenced in 1866, and on January 18, 1871, the North German Confederation was replaced by the German Empire.

GERMAN EMPIRE. — The German Empire comprises all the territory of the North German Confederation, the south German states, and Alsace-Lorraine, this last being a federal possession (Reichsland), and, as such, governed directly by the empire. The supreme authority is exercised by the King of Prussia, who has the title of German Emperor, and, therefore, it is in the Prussian constitution that we must look for the rules of succession to the imperial throne.

Has the constitution of the German Empire (16th

of April, 1871), led to the disappearance of the international existence of the private states? It would be going too far to answer this affirmatively, since states like Bavaria send representatives abroad and receive them from foreign countries, and since, also, the same states may conclude certain treaties (such as the extradition treaty entered into in 1885 by Bavaria with Russia). We may say, however, that from the international point of view, and as a material matter of fact, it is only the empire that counts.

From the standpoint of interior administration, there are a large number of interests which the German states have surrendered in favor of the empire. There is a parliament which exercises the general legislative power, and is composed of two chambers: the Federal Council (Bundesrath), made up of the representatives of the government of the states, and the Reichstag, representing the popular element of the empire. A law of the empire is made by the accord of the two chambers; the emperor promulgates it and sees to its execution.

As we have seen, the German Empire has but little resemblance to a confederation; one may ask whether it does not correspond rather to the form of state known as a federal state or federation, of which the United States constitutes the first and most important example.

THE UNITED STATES.—The Union comprises forty-eight states, a district, two territories (Alaska and Hawaii), and certain insular appanages or possessions. Soon after the Declaration of Independence the English colonies of North America constituted themselves (1777) into a confederation; but when all danger had disappeared, the inconvenience of this method of association became apparent, and, to strengthen the ties of the Union, the people adopted the form of a

federation, by the Constitution of September 27, 1787, which today is still in force.

The Federal mechanism in its essential points, from an international point of view, comprises: the President of the Union, chief of the federal executive power; a Congress (the legislative organ), comprising two chambers: the Senate, which represents the associated states, and the House of Representatives, which represents the whole of the people.

From an outside standpoint, the states of the Union do not exist; it is the federal government at Washington which represents the Union in the face of the world, and the particular states are no longer persons under the law of nations. The American system presents, from the viewpoint of International Law, certain features which would appear to demand a change. While our international relations are conducted entirely by the Federal Government, and the treaty making power is prescribed by the constitution, there are no means provided therein for forcing the sovereign states of the Union to live up to the treaties. A treaty to which the United States is a party is a law of the land and the laws will reach the individual who violates them. With the states, however, it is different. While they have delegated to the central power, through the Constitution, the right to make treaties by which the Union is bound, they have failed to provide for a method through which a state which should violate a treaty might be brought to book. We have had unfortunate examples of this in cases where foreign rights secured by treaty have been, or are claimed to have been, trampled upon, and the state in which the wrong was done has refused to afford a proper remedy or even to heed the advice and remonstrance of the Federal Executive which is charged with the execution of existing treaties.

The same objection exists also in the case of those

states whose colonial possessions are very extended and rejoice in great independence as regards the mother country, without, however, having an international existence. (The difficulty between France and Great Britain in regard to the Newfoundland fisheries is an illustration of this.)

**THE SWISS CONFEDERATION.**—The system of a federal government has also been introduced into Europe. It is in this sense that the political evolution of the Swiss cantons took place. After having been a confederation, the associations of the Swiss cantons took on the character of a federal grouping. The change dates from September 12, 1848. The executive power is confided to a college of seven members, called the Federal Council. There is a legislative body called the Federal Assembly, comprising two chambers: The Council of States which represents the cantons, and the National Council which represents the whole of the people. The name "Swiss Confederation" is today a misnomer. It is proper to add that the constitution of 1874 recognizes in the different Swiss cantons the right to conclude, individually, certain treaties concerning matters of police, of neighborly understanding, and of political economy. Thus, the cantons are different from the states of the American federation, in that they have retained, in a certain measure, their quality as persons under the law of nations.

### **International Differences**

**CAUSES OF DIFFERENCES**—States, like individuals, may have occasion to differ among themselves.

These misunderstandings may have different causes:

- (1) An attempt made against the honor or dignity of a state.
- (2) The violation of a treaty.

(3) Difficulties arising between a state and the subject of another state, or between subjects of different states.

(4) A violation of territory or a controversy in regard to a frontier.

The delimitation of the Franco-Spanish frontier, under the terms of the treaty of Utrecht, should immediately have been proceeded with. This was in 1659. It was only undertaken in 1853 and was not finished until 1868; questions of detail, however, still present themselves, which explains the continued existence of the Commission of the Pyrennes. This is an extreme illustration of a prolonged international difference which has never, however, passed the bounds of diplomacy.

The United States has had many boundary disputes on its hands of which the most recent is that of the Alaskan border. None of these have led to armed conflict, unless we accept the Mexican war as indirectly due to the question of the Texan boundary.

Two more examples of such disputes may be given.

A difference between France and Brazil in regard to the limits of Guiana very nearly arose as the result of the discovery of gold mines in the contested territory. This incident was settled by arbitration.

An actual dispute of the same nature between Peru and Ecuador has been submitted to the arbitration of the King of Spain. If the claims of Ecuador were allowed in their entirety, Peru would lose a dozen large states.

### **The Settlement or Consequences of International Differences**

International disputes may have different consequences. We may cite the following pacific means for determining them.

- (1) An offer of direct settlement, or direct negotiations.
- (2) Mixed commissions.
- (3) Good offices.
- (4) Mediation.
- (5) Arbitration.

**DIRECT NEGOTIATIONS.** — Direct negotiations start with semi-official protests, followed by official ones, leading to verbal discussions between the agents of the two governments. An understanding is thus arrived at, either by the abandonment by one of the states of its claims, or by the admission of the right of the other state; sometimes, also, by a compromise. When negotiations give no immediate results, reservations are noted and an agreement is usually arrived at later. If the question concerns matters of little importance the case is allowed to trail along. The negotiations consist in dispatches exchanged at long intervals, until a day arrives upon which an occasion presents itself which will permit the affair to be terminated.

In 1887 the misunderstanding between France and Germany raised by the Schnoebélé incident was settled by the method of direct negotiation. Schnoebélé was a French commissary of police. From the nature of his functions he was brought into relations with one of his German colleagues. The latter invited him to an interview on German territory. Schnoebélé was arrested while alleged to be on German territory and accused of high treason. In addition to the fact that this accusation, brought against a non-German subject, seemed untenable, the question was raised as to whether the arrest had taken place on French or German territory. Great excitement was aroused, and war nearly followed. As the result of the negotiations, Schnoebélé was released. The German government recognized that the arrest



had taken place as the result of an invitation, accepted by Schnoebélé, who, by the fact of such invitation should have been considered as bearing a safe-conduct.

By the above means, questions based, not only on rights but also on interests, may be regulated. This remark has great weight since grave difficulties which may lead to an armed conflict are often based on interests and not on matters of disagreement in the legal sense of the word.

The Anglo-France arrangement of April 8, 1904, offers an important example of a settlement by the method of direct negotiation. The French rights over a part of the coast of Newfoundland date from 1713. They have given rise to many discussions and to numerous disputes, among others that of 1891, which was submitted to an arbitration which was not successful. No doubt had arisen as to the validity of the rights of France on the French shore, i. e., the exclusive right of fishing and of temporary establishment. But these rights had become annoying beyond all expression to the inhabitants of Newfoundland. The servitude placed upon this coast was no longer the same as in 1713. This fact had to be recognized. At the earlier period the coast was almost entirely deserted, but today, the island population, having noticeably increased, shows a disposition to make use of all the territory. England was wrong in not calling the attention of the inhabitants of Newfoundland with sufficient energy to the fact that they should respect international engagements entered into in a perfectly regular manner. Nevertheless, in such a case it was good politics for France to be satisfied with a compensation in lieu of a positive right.

What is known as the "Trent affair" offers a good example of direct negotiations to which the United States has been a party. In 1861 Captain

Wilkes, of the U. S. Navy, boarded a neutral British ship and removed therefrom two emissaries of the Confederate government who were bound to Europe. By direct negotiations between the British government and that of the United States, the latter government was shown to be clearly wrong in supporting the act of Captain Wilkes; it gracefully receded from a false position and released the two emissaries, thus avoiding a threatened outbreak of hostilities with England.

CONSTITUTION OF MIXED COMMISSIONS.—An understanding may be sought by means of mixed commissions, when, for example, the litigation arises from difficulties having a technical nature. These commissions plan a solution, and search for a common ground of understanding, the litigant states not engaging themselves to accept the proposed solution, though they may do so.

As an example of recourse to a mixed commission, we may cite what quite recently occurred in regard to the territory of Alaska. The treaty of 1825 between England and Russia fixed, in a very confused way it must be said, the frontiers of what was then called Russian America. This confusion had at the time but relative small importance, as Russian America was believed to be buried under ice and snow for nearly eight months of the year. In 1867 Russia sold Russian America to the United States; Russian America then became Alaska. The territory becoming peopled as the result of the discovery of numerous mines, particularly gold mines, it became important to determine exactly the line of demarcation between Alaska and the Dominion of Canada. The coast was cut up by numerous fjords and it was impossible to determine where the boundary met the sea. The search for the frontier was confided therefore to a mixed commission composed of three Americans, two

Canadians and one Englishman, it being decided that the solution which should have a majority of the votes would be accepted. The examination of the terrain and the discussions lasted a long time, and it was only in October, 1903, that one of the commissioners, Lord Alverstone, Lord Chief Justice of England, formed a majority by attaching himself to the delimitation proposed by the American commissioners, and by holding that the Canadian commissioners were wrong.

**GOOD OFFICES.** — When a solution can not be had by the above means, recourse may be had to the intervention of a third party, which offers its good offices, or which has been asked for them. It is thus that we have seen the intervention of the American Minister at Caracas, arise in the Venezuelan incident of 1902. In that case Germany and England complained to Venezuela of the outrages to which their nationals had been subjected as a result of the revolutionary condition of the country. Venezuela referred them to its courts. To this Germany and England objected, knowing as they did the nature of the courts. Venezuela refused other satisfaction and the two aggrieved nations presented an ultimatum which was followed by bombardment, a blockade, and the sinking of certain Venezuela cruisers. At this Venezuela gave in, and the matter was arranged, thanks to the intervention of the Minister of the United States.

**MEDIATION.** — Recourse may also be had to mediation. Here it is a third power, friendly to the two powers in litigation, which intervenes. Mediation may have for its purpose either to prevent a war or to cause its cessation.

Mediation is not the solution of a difference, but it may lead to a solution. The mediator does not settle the question but serves as an intermediary. If the mediator, however, chosen by a common accord, has

a strong personal authority, and if he has to the same degree the confidence of the two parties, then there is every reason to believe that his counsels will be heeded and his advice followed. It is for this reason that mediation is sometimes confounded with arbitration. Mediation does not end the dispute. It is necessary that states accept for themselves the reasons urged and the suggestions offered by the mediator, and the solution results from an understanding between the parties at odds, based on freely accepted conclusions.

An example of this is found in the dispute which arose in 1885 between Germany and Spain. Germany had occupied one of the Caroline Islands, looking upon it as having been freed from any sovereignty. Spain protested and declared that the Caroline Islands were not *res nullius*, being held under Spanish sovereignty. The relations between the two states were soon tense, and in Spain hostile manifestations took place against the German embassy. Prince Bismark suggested to Spain that Pope Leo XIII be taken as mediator. The suggestion was favorably received. This was enough to indicate that the moral authority of the Pope was sufficiently powerful to cause his suggestions to be accepted, and, in fact, the two powers signed a protocol under which they agreed to the views suggested by him.

From a legal point of view this was a mediation, but confusion might arise and it was possible to consider it an arbitration. If the Pope had been an arbitrator his decisions would have been the settled solution. It would have ended the litigation, requiring that the parties should accept it.

In some countries when a difficulty arises between individuals, there must have been, prior to their being allowed to plead before a tribunal of record, an effort made to reach an agreement before a justice of the peace. It has been asked whether it would not

be well to introduce this rule into international relations.

At The Hague Conference mediation was recognized as having a great moral value. The question of making it obligatory was discussed; but the principle was not accepted. The following formula was adopted: "In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, *as far as circumstances allow*, to the good offices or mediation of one or more friendly powers." (Article 2, Convention for the Pacific Settlement of International Disputes.)

One of the articles further adds: "Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance. Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities." (Article 3, *idem.*)

One can see by these very terms that the disputing powers are free to have recourse to mediation or to reject good offices, since these powers alone can determine whether the circumstances lend themselves to the first or permit them to accept the latter.

Besides, a power might feel that the mediation, or good offices of another power, would constitute for the first power, an act not entirely friendly. Having this fact in view, The Hague Conference declared that "The exercise of mediation or of good offices can never be regarded by either of the parties in dispute as an unfriendly act." (Article 3, *idem.*) It is difficult, nevertheless, to prevent one of the parties from retaining a certain resentment.

Notwithstanding the work and the expressed hopes of The Hague Conferences, it must be remarked

that in the conflict between England and the Transvaal no power offered its good offices or its mediation—perhaps because the Transvaal was not counted among the signatory powers.

In the Russo-Japanese war it was only towards the end of the conflict that a power—the United States, so located, by the way, as to make its condition special, and having, besides, an economic interest at stake—offered its mediation.

Under certain international engagements mediation is obligatory. The treaty of Paris of March 30, 1856, in Art. VIII, stipulates that in case of litigation between Turkey and one of the signatory powers, appeal must be made to the mediation of a friendly power before recourse can be had to arms. Turkey claims that Russia, in 1877, did not respect this clause of the treaty, but the claim does not appear well founded. The Treaty of Berlin, of February 26, 1885, in Art. XII, requires the signatory powers to resort to the mediation of one or more friendly powers before undertaking hostilities, this having in view the disputes which might arise respecting their possessions in the Basin of the Congo.

Mediation may therefore be of service because it is easier for states to accept advice and to follow it than to submit to a verdict. Besides, mediation opens up a much broader field of action than does arbitration, which presupposes a litigation in the judicial sense of the word, and which, in consequence, must be determined by a judge. It often happens that interests alone are at stake, and in such a case it is very difficult to conceive of a judge, properly speaking. In this respect the Russo-Japanese war again furnishes a good example. It became necessary to determine whether Russia or Japan should exercise the preponderant influence in Korea. Each of the former states believed that in order to maintain a political

equilibrium its interests forbade the enjoyment of an influence by the other. A mediator might have proposed a solution, but one could not have found a judge; since there was no rule of law to be formulated or to be determined.

ARBITRATION. — Arbitration, differing from mediation, is a pacific *solution* of disputes. International arbitration differs from arbitration between individuals; when a difference arises between two individuals, the latter leave it to an arbitrator and thus substitute for the ordinary jurisdiction of the courts a jurisdiction agreed to between the parties. When two states agree to have recourse to arbitration, on the contrary, they create a jurisdiction where none before existed; since, properly speaking, there could not exist a true jurisdiction, the states not recognizing a common superior. We may observe also, that if, in the relations between individuals, the accepted arbitration leads to a solution which may be carried into execution as a matter of law, is not the same in international law unless the parties are entirely willing.

When two states in litigation wish to end their differences by arbitration an agreement must first be prepared, which has for its object to determine exactly the question to be adjusted, in legal parlance to frame an issue, then to select those who shall pass upon it, and to fix certain rules of procedure.

International arbitration is very old, and many examples of it may be cited. But for a long time the arbitrator was chosen from among the sovereigns, as arbitration was considered a political or diplomatic act, and the actual questions under examination were more or less secondary. Afterwards the system changed, due to the fact that the questions submitted for arbitration had grown very important, and arbitration came to be considered as being of a nature

more judicial than political. A true tribunal became instituted.

This evolution was reached as the result of a celebrated case known as the "Alabama Case." During the struggle which rent the American Union from 1861-65, the Washington government believed that it had a right of complaint against England which was accused of not having observed its duties as a neutral, by allowing ships intended for the Confederates to be armed and equipped in its ports. After a long discussion the two powers agreed, in the Treaty of Washington of May 8, 1871, to refer their dispute to a tribunal of arbitration composed of five arbitrators chosen from Brazil, Italy, Switzerland, England and the United States. This tribunal, organized in Geneva, was charged with the investigation of the question as to whether the responsibility of Great Britain was involved. The question was a most important one, and a verdict of many millions of indemnity was possible, if it were admitted that indirect damages should be taken into consideration. There was an exchange of pleadings as would be the case before a civil tribunal, and many arguments were made; finally, a verdict was reached, calling upon England to pay an indemnity of fifteen and a half million dollars. England paid it.

This arbitration made a tremendous stir, first, because of the gravity of the issue; second, because of the judicial forms observed. As a result, there have since been many important cases of arbitration; among the most important we may name the conventions having relation to the Bering Sea fisheries and to the delimitations of British Guiana.

But, ought one to wait for disputes to arise before having recourse to arbitration? or may one foresee them and arrange in advance to submit to arbitration cases of future disagreement?



In treaties of commerce it has become customary to insert a clause by virtue of which certain difficulties are to be regulated by arbitration. Such a clause differs from an agreement, since it applies to future misunderstandings, but will lead to an agreement should the misunderstandings arise. Arbitration treaties have been signed where the arbitration clause is the basis of the treaty and not simply an article thereof.

Arbitration thus seemed to be the normal way to regulate international disputes, and many suggestions were offered having this in view, but the situation was exaggerated, not all disputes could be regulated by this means. Nevertheless, so serious a general movement culminated in the conference of The Hague of 1899.

The conference of 1899 suffered much in its reputation from the name which it received of the "Peace Conference," since it was almost immediately followed by the terrible South African war. The purpose of the conference has been claimed to be disarmament; this was not so. Never was there a question of it. The messages of the Czar concerned only the limitation of armament, and it was soon seen that even this was a chimera. A committee on disarmament, charged with a study of the report to be made on this point, reached no result.

However this may be, at The Hague Conference attention was directed towards the organization of arbitration. An effort was made to establish arbitration as obligatory prior to any appeal to arms. These propositions were not accepted. It was then proposed to limit the cases which should be submitted to a solution by arbitration, and several such cases of small importance were determined upon, but this project had to be abandoned on account of the opposition of Germany.

Something, however, remains of the work of the Conference, these are the regulations on arbitration, a true code of procedure; and today, if two states have agreed to settle a dispute by arbitration, it will be sufficient for them to call upon the permanent Court of The Hague created in 1899.

Is it to be understood by this that a permanent court of arbitration exists? No, the court does not in reality exist. It is provided in the convention that each power shall designate four persons, as a maximum, all to be of recognized erudition in international law, of high moral standing, and willing to accept the functions of arbitrators if called upon. Such is the composition of the court of arbitration which consists simply of a list of about seventy persons; so properly speaking the court does not sit permanently. It is from this list of jurisconsults, however, that the arbitrators in a given case are to be chosen. In general, each power chooses two and the four arbitrators thus selected choose the fifth. Often there will be but three; this will be the actual tribunal of arbitration. But these arbitrators will disappear as such after each case, so that there will be a special bench for each cause. However, there does exist one permanent thing, and that is a clerk's office, or office of the court, and a personnel of secretaries. To sum up: There exists only the permanent "cadre," of a changeable tribunal.

Up to the present time the court has been convened four times for questions of a judicial nature. One of the last occasions was on the 22d of May, 1905, for the interpretation of the treaties of commerce between France, Germany and England joined on the one side, and Japan on the other. There was an arbitrator for each party, and the two arbitrators chose a Norwegian as sur-arbitrator. The Europeans won the case.

In the convention of The Hague, 1899, (Art. 19), the signatory powers reserved the right to conclude, in the future, conventions having for their object to make arbitration obligatory in certain cases. This is a right which of course has always existed and always exists; but the reservation remained a dead letter until France and England passed a treaty of arbitration on October 14, 1903. In that treaty it was stipulated that differences of a judicial nature which might arise between the government of the French Republic and that of His Majesty the King of England, and which might not have been solved by diplomatic methods, should be submitted to the permanent court of arbitration, except questions affecting the vital interests, the honor and independence of either country. It follows that arbitration is obligatory in the unrestricted cases.

Conventions of this nature have only a relative importance, and will be effective only if the good will of the parties which exists at the time of signing, continues to exist up to the moment of execution. If the good will persists the dispute may be determined without a preliminary convention; if it does not persist, arbitration may be avoided on the pretext that the matter at issue concerns the vital interests, the honor, or the independence of one of the countries. Nevertheless, the Anglo-French convention has met with some success, since it has been followed by other similar conventions with Italy, Spain, Switzerland and Denmark. It had a still greater success, when it was imitated in a treaty concluded between Germany and England in 1904.

Finally, in 1907, took place the Second Hague Conference. The question of obligatory arbitration was naturally brought forward again. Of forty-four states represented, thirty-two were in favor of it. Germany, however, presented a categorical refusal.

An effort was made to organize a true court of arbitration, composed of judges who, though technically permanent, would sit only when needed. It was impossible to reach an understanding upon the choice of these judges. The smaller nations desired to be represented on the principle of equal representation, but all agreed that it would be impossible to establish a bench upon which more than seventeen judges should sit. Failing to reach an understanding on this point it was passed over, and the court of arbitration is all prepared for, excepting the organization of the bench.

In regard to maritime matters, there was better luck.

An international prize court was established composed of fifteen judges, and if an understanding was reached it was because the small nations had more interest than the great ones in the creation of such a court, an impartial tribunal charged with the settlement of questions which, up to that time had depended on the competence of the tribunals of the particular captor. In addition, the principle of equality was saved, because where a nation is a party to a case it always has the right to claim the presence of one of its own nationals on the prize court.

Thus the conference succeeded in creating the first international judicial organization, from which we have the right to expect the happiest results. The United States is not a party to this convention, at least in the sense that it has not been proclaimed by the President, although as modified, it has received the approval of the Senate. The general question of maritime prize courts can have but an inferior interest for us and it will be sufficient for our purpose to say that The Hague Convention contains some rather vague directions as to the procedure which is to guide the court. Thus, "if no generally

recognized rule exists, the court shall give judgment in accordance with the principles of justice and equity." Of such broad language some of the states fought shy. England, as has been already stated, called a convention at London in 1908, for the purpose of formulating a precise set of rules which would meet the case. The convention which ended with what is known as "The Declaration of London" February 26, 1909, offers the following preliminary provision: "The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law."

The chapters mentioned contain quite full rules in regard to blockade, contraband, unneutral service, destruction of neutral prizes, transfer to a neutral flag, enemy character, resistance to search, convoy and compensation.

The original convention was so framed as to present, in the opinion of some American lawyers, a feature which under the constitution could not be accepted by the United States. This was the provision which involved an appeal from the Supreme Court of the United States to the Permanent Prize Court. A modification of the feature was suggested at the London meeting, and all the signers of the original convention have accepted the change.

I am at present unable to name the powers which have ratified either the Prize Court Convention or the Declaration of London. For those who ratify the latter there would appear to be no further reason for abstaining from a ratification of the former.

The Convention of The Hague of 1899 laid the ground for another institution of great importance; in its 9th article it instituted an international commission of inquiry. This had for its purpose to facilitate the determination of disputes which concern

neither the honor nor the essential interests of a state, but arise from a difference of understanding on questions of fact. The report of this commission, which is limited to a determination of facts, has in no wise the character of a verdict of arbitration.

A serious case brought into relief the importance of this institution; this was the Hull incident which occurred in October, 1904. Vessels of a Russian squadron had fired upon English fishing boats. Strenuous complaints from England. War was on the point of breaking out, but it was found possible to calm the two powers, and they reached the point of naming a commission of inquiry. It should be remarked that there was in this case an extension of the terms of the convention of 1899, because Russia was compromised by the responsibility which fell upon it, and vital interests came into play. The commission, composed of five members, sat in Paris under the presidency of Admiral Fournier. The solution which it proposed was accepted by the two governments, and Russia paid an indemnity to the fishermen; war was averted.

### THIRD LECTURE

---

#### Violent Results of International Disputes

**D**IFFERENCES between states may not be settled amicably, and the resulting dissatisfaction may manifest itself under various forms. A dispute may have a particularly violent result—war. But there may be means of coercion which do not go quite as far as war. Such are reprisals.

**REPRISALS.**—Reprisals are acts of violence. They contemplate acts contrary to law, made use of against a state as a means of constraint, with a view to obtaining satisfaction. There may be confusion in regard to this subject. Example: Two states not joined by a treaty of commerce fail to understand one another with regard to the reciprocal rights of certain transactions. If one of these powers imposes high duties upon products imported by the other, and the latter responds by an analogous measure, it is said that there have been custom house reprisals. This expression is an improper one, since either of the states may raise its tariff; it is perhaps, an impolitic act and one lacking in courtesy, but it is a right; if there be no treaty of commerce any state is free to regulate at will its commercial relations with another state, and in doing so it is only making use of its right, which is that of *retorsion*.

Reprisals are exercised only by a state. In other days they might be exercised by individuals with the authority of their own government. They are directed against an opposing state or sometimes against individuals of that state. In the latter case it is manifestly unjust to strike at a subject of a state in order to punish the state itself; but it is a means of

exercising pressure on the government. Reprisals are used only between states of unequal strength, since if the states were upon an equal footing the first act of violence of the one would be followed by an act of violence on the part of the other, and there would be war. Reprisals may be made use of either in time of peace or war. In these lectures we will concern ourselves only with reprisals in time of peace. The means employed in executing reprisals differ greatly. One method to be recommended, consists in striking at a government alone. This is the method which was used by France in relation to Turkey, when the French fleet seized the Turkish custom house at Mytilene.

Maritime states sometimes use the *embargo*, that is to say, the seizure of vessels of the offending state found in the ports of the offended power or even at sea within its territorial waters.

Another means—a less strenuous one—is that of the peaceful blockade. This consists in blockading a port without other warlike operations. In this way one strikes at the commerce of the port; but one strikes at the same time at the commerce of third powers. This was the method employed in 1902 by England and Germany against Venezuela.

Sometimes recourse is had to more energetic acts. In 1884 French reprisals against China went so far as the bombardment and destruction of the arsenal of Fouchow.

Some reprisals consist in extremely violent measures, and one may well ask in what respect they differ from war. The difference consists, first, in regard to the status of the parties, who are not at war. Reprisals allow treaties to remain active; war does not. There is a distinct difference in so far as regards third powers, in the sense that there is no requirement of neutrality as in case of war. Within all pos-



sible limits, the effects of reprisals are restricted to the two states in dispute, and this carries with it, for the state which makes use of reprisals, consequences which may be either advantageous or disadvantageous. Thus, in the French dispute with China in 1884-85, France claimed that it was not at war. The advantage was that its diplomatic relations with China continued, and as there was, properly speaking, no neutrality, the French vessels were at perfect liberty to coal, particularly in the harbor of Hong Kong. Moreover, and still more to the point, there was an advantage to the French in relation to home politics, as the use of the word "war" would have been unfortunate for the deputies who were supporting the government. But there was also a disadvantageous side. The subjects of third powers might carry to China arms and food. France had not the right to visit their ships at sea. England changed the situation by deciding to apply the rules of neutrality—then, no more coal. As a result of that action the French suffered the inconvenience of war with none of its advantages. They then considered themselves at war, declared rice contraband and exercised the right of search.

Violent measures employed under the name of reprisals certainly resemble war. In 1900 it was learned in Europe that grave events were occurring in China, that the foreign legations in Peking were threatened, and it was decided to send troops there. Germany was regarded as having the greatest interest in the situation, not because of her commercial interests in the Orient, but because her ambassador had been assassinated. The expedition was placed under the orders of the German General Von Waldersee.

There was an expedition, and there was fighting during the march of the expeditionary corps to Peking, but there never was war. Thus, the diplomatic agents

did not have to quit their posts. Then, when the legations were freed, China was informed of the terms upon which its territory would be vacated. The effect of having it supposed that there was a treaty of peace was thus avoided. As a result, words were carefully chosen; no allusion was made to earlier treaties, and it was by a protocol in 1901 that the accord with China was established.

Recently, at Casa Blanca and also at Oudjida, the French have been without doubt committing acts of warfare, and yet France is not at war with Morocco, to whom it is actually lending money.

WAR. — War must be looked upon as a condition of fact which consists in acts of violence having for their purpose as a whole to constrain a vanquished adversary to accept the will of the victor. We must omit from the definition of war any idea of right, but obviously we must understand that a war should not be waged unjustly. If one belligerent might lay claim to special rights because its cause is just, it is hard to see what rules could apply, for the reason that every belligerent claims to be in the right.

That which constitutes the gravity of war is that it places at issue the existence of the contending states. It almost always happens that the result is quite different from a mere solution of the dispute, and that the original dispute is lost sight of at the conclusion of the war. Thus, in 1870 war arose as the result of the pretensions of the French government, which demanded a definite renouncement of the candidacy of the Hohenzollerns to the crown of Spain. The solution was the taking of Alsace-Lorraine by Germany, and the question of a German pretender to the throne of Spain was lost sight of.

In the war of 1898 between Spain and the United States, the United States had complained of the blowing up of the battleship "Maine" in Havana harbor

as a result of the malevolence of the Spaniards; besides, the United States desired the independence of Cuba. As a result we find the relative independence of Cuba, but beyond this the United States caused to be ceded to it Porto Rico and the Philippines. This illustration, offered by Prof. Renault, does not appear to be as apt as is the one concerning the Franco-German war; the true difference between the United States and Spain was due to the general condition of things in Cuba and the loss of the "Maine" was but an aggravating incident.

The Russo-Japanese war furnishes a rare example of a war in which the purpose of the dispute was attained by the conquerer. The war was dictated by the competition between the two powers in regard to the influence to be exercised over Korea and by the presence of Russian troops in Manchuria. In the result, Russia recognized the rights of Japan over Korea, renounced portions of Chinese territory which had been leased to it and vacated the Chinese province of Manchuria; there was but one point outside the cause of dispute, and that was the cession of a part of the island of Sakalien by Russia.

The dangerous effect of a war, therefore, is that the object of the dispute does not govern the solution. What we must accept as true is, that war is not the solution of a difference, but that it may lead to a solution. *War has for its purpose to determine which of the contestants is strong enough to impose his will.*

The purpose of war being to permit a belligerent to impose his will, we may exclude all means which are not required to attain this end. We may not consider as proper, acts of cruelty, etc., since one may not do harm for the sake of harm, but only to reach an end.

states; such contact may lead to difficulties. Again, the war vessels of the belligerents may enter neutral ports, and this presents a source of difficulty, particularly in regard to revictualing.

**WAR, PROPERLY SO-CALLED, AND CIVIL WAR.**—When a struggle within the confines of a state assumes certain proportions, it may be a question whether it is or is not, an occasion to apply to the belligerents the procedure of war, properly so-called—that is to say, whether those in revolt should be called rebels or recognized as belligerents. The Cubans who were struggling against Spain were never recognized as belligerents even by the United States. The Confederates during our Civil War, on the contrary, were recognized as belligerents by England and France. There is a marked difference in the status of those in rebellion in the sense that, the war ended, the legal government being the victor, may punish insurgents or rebels for the infraction of laws which they should have respected and which they violated; whereas, if they are true belligerents, there is no punishment for vanquished enemies following a war. Often at the end of a civil war an amnesty is proclaimed; this means that the past is forgotten, but it seems to affirm a right of punishment of which advantage is not taken. In a civil war there is great interest for third parties in knowing whether the contending factions are belligerents. In the case of war at sea, the acts of the party which is not recognized as a belligerent would be acts of piracy.

### **Who Has the Right to Make War**

This question presents itself under a two-fold aspect:

1. From the standpoint of international law.
2. From a constitutional standpoint.

In principle, every sovereign state has the right

to make war, since that is the sole method of enforcing what the nation considers its rights.

Not all states, however, are full sovereign states.

There are neutralized states. Such is the case of Switzerland since 1815; of Belgium since 1831, and of the Grand Duchy of Luxemburg since 1867.

From the fact of their neutrality, and of the recognition of this status by the great powers, these states have not the right to make war or to enter into engagements (a treaty of alliance, for example) which might lead them into war. However, if, as the result of certain circumstances, they do engage in war, they will have to appeal to the powers which guarantee to them the right of neutrality.

Besides these neutralized states deprived of the right of making war, there are states which are said to be protected or vassal, dependent upon another state, called the protector or suzerain. These may not make war, but they may be dragged into it by the sovereign state; no more may war be made against them; any complaints against such vassal states must be settled with the suzerain. Such is the theory.

Under this theory various claims have, however, been advanced.

Thus, in 1881, at the time of the differences between France and Tunis, Turkey thought that it should assert its right of suzerainty. This right was thrust aside by France, which based its action on certain earlier cases when Tunis had found itself in a state of war and Turkey had not intervened.

The same claim was put forth by China at the time of the French difference with Annam. France questioned the vassal condition of Annam, and considering it as an independent state, made war against it without bothering itself about China.

At the time of the war declared in 1885 by Servia against Bulgaria, a Turkish vassal, the Prince of Bul-

garia called upon his suzerain, but at the same time placed himself on the defensive without awaiting the answer of the Sultan. The fate of arms was favorable to Bulgaria, which but for the intervention of Austria, would have occupied Servia.

From a constitutional point of view, no general rule may be laid down as to who, in a state, may decide if war shall be made or not. But a distinction must be made between that decision and a declaration of war. A declaration of war is a notification of the intention to make war. This notification may be made only by the executive power, which alone is qualified to correspond with other states.

But if it appears that the executive power has the sole right to declare war, has it the right to decide upon it? This depends upon the constitutions of the several states.

Under our constitution (Art. 1, Sec. 8, Clause 11) Congress alone has the power to "declare war." This must be accepted as meaning that Congress must determine whether war shall be declared since the formal notice to the nation against which war is to be waged, and the notice due to the world at large of the institution of hostilities, must be made by the Executive as the latter alone is in a position to communicate with the foreign powers. We might put it otherwise and say that Congress determines upon a war and the Executive proclaims the determination. From the standpoint of International Law the term "Declaration of War" is held, as I have stated, to mean a notice that war is to be made. It is possible for the United States to become involved, however, in a war without the direct action of Congress, since the latter has placed on the statute books a provision of law authorizing the President to repel invasion with the aid of troops which he may directly summon. It might follow therefore, that by exercising the au-

thority thus given, the President, of his own motion, could virtually establish a state of war with a foreign power.

In England the sovereign decides as to war, on the proposal of the cabinet, which represents the will of Parliament.

In France today, in accordance with law, the President of the Republic may only declare war, with the assent of the two chambers. It is not laid down under what form this assent shall be shown. It will be most often in the form of credits appropriated, in an unequivocal way. Under the German system, the emperor declares war with the assent of Bundesrath.

The theory has obtained that an assemblage representing the people will be more conservative in regard to a declaration of war, than would be the individual Executive of a nation, and from this theory has sprung the fact that in practically all modern constitutions there is a requirement that the people as represented must give consent to proposed hostilities. This theory would appear, however, to be a fallacy, for experience would seem to show that popular clamor is less likely to attain conservative results than is the calmer judgment of an Executive who has a clearer view of the general situation and who understands the responsibilities which a war may entail.

### **How Should a War be Opened?**

This is the old, old question in regard to a declaration of war.

For a long time the declaration was clothed with solemn formality. Thus, under the Romans, a declaration of war was preceded by solemn rites; any war in which these preliminary rites had not been fulfilled was declared an unjust war. In the middle ages, under the influence of chivalry, the intention to have

recourse to hostilities was made known through the heralds.

But we can conceive of a notification of intention to make war being issued by a diplomatic agent accredited to the power in interest.

The question of whether there is any obligation to notify an opponent of the intention to make war before commencing hostilities has been very much discussed.

Various forms may be adopted. In the course of negotiations one power may notify another of its final wishes by sending an ultimatum in which it is declared that if satisfaction be not given by a stated time, or that if the answer be not favorable, the first power will have recourse to force to obtain satisfaction. In this case the declaration of war is clothed with a conditional form, since it is subordinated to the non-acceptance of the condition of the ultimatum. There is, therefore, no surprise. The situation is clear cut, since the adversary knows that an unfavorable reply, will carry with it hostilities. There has been much discussion in regard to all this, and there would appear to have been as many cases of a declaration of war by ultimatum as by any other form.

The war of 1870 commenced as the result of a declaration made in Berlin by the French diplomatic agent. The Boers declared war against England by an ultimatum.

It is certain that if one take the military view one must desire that there be no requirement of a declaration, in order that one may act without losing time and thus be the first to take the offensive. But when one considers the pacific relations which must be the normal relations between states, it is of course rare that hostilities begin in an unexpected manner.

However, at the beginning of the Seven Years' War an English squadron, at a time when there was



still only tension in the relations of England and France, sailed with secret orders which were to be opened at sea. These orders, which were put into effect, directed that the squadron seize French commercial vessels. It is undoubtedly because the English expect that recourse may be had to an analogous method in regard to them, that they have always opposed the opening of a tunnel under the British channel; clearly, if it were certain that hostilities might not take place before a preliminary warning thereof, the question of piercing a tunnel would present no danger, since it could be readily destroyed in time and thus shield England from any danger of invasion.

At the second conference of The Hague, in 1907, the French delegation caused to be adopted, without difficulty, the following proposition:

“The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasonable declaration of war or of an ultimatum with conditional declaration of war.” (Art. 1, The Hague Conv. relative to the opening of hostilities. Conv. No. 3.)

It is a good thing, undoubtedly, for public opinion, that the causes which are of a nature to bring on a conflict be shown.

But the proposition is incomplete in the sense that it speaks of a preliminary notice. What is to be understood by this notice? Logically a determined period of delay should have been fixed between the notice and the commencement of hostilities. This, by the way, is what was asked for with great insistence by the Dutch delegation and particularly by the Russian delegation. It is clear that if one could agree to establish a real delay of eight days, for instance, it would be a great relief to all European countries, because they would not be required to have a strong contingent of men continually under arms

to answer an attack which may be unexpected. Peace, therefore, would need to be less well armed.

The French delegation, holding to the agreement already reached, rejected the question of fixing a period of delay since, theoretically, it had doubts as to what the effect of this delay would be on the navy. For land troops one might fix such a period; but what would become of the naval movements? Could the warships of one of the belligerents place themselves in a position to seize a point or block a port, when the object of their mission would be known? Such ships, however, could not be required to remain stationary. The adversary might further choose his moment and profit by the fact that the squadrons of the fleet were occupying distant stations. One can see that, even with the best of good will, this question of delay is an extremely delicate one to regulate.

Another proof of this difficulty is that, in a discussion of this question by the Institute of International Law in September, 1906, at a meeting held at Ghent where the savants were held to a less reserve than would be the case with governments, the majority did not consider it wise to determine upon a period of delay.

To sum up, therefore, it is a question of good faith, and we shall see in the future whether a notification has been made with a sufficient subsequent delay.

When hostilities broke out between Japan and Russia, the press of different countries spoke rather carelessly, it would seem, of Japanese perfidy. If we examine all that then occurred, we must recognize that on the 6th of February, 1904, the Japanese minister at St. Petersburg presented two notes; in the first, Japan brought to the notice of Russia the rupture of diplomatic relations. This rupture did not necessarily carry with it recourse to war, but the sec-

ond note gave notice that Japan *would seek other means*, which might well have been considered in the light of a declaration of war. It is not right, therefore, to speak of perfidy, the more so since there was then no obligation, under international law, to proceed by means of preliminary notice. Forty-eight hours later Japanese torpedo boats penetrated the bay of Port Arthur and tried to torpedo Russian battleships. It would seem, under the circumstances, that the vigilance of Russia was alone to be questioned, since, in view of the strained relations, notice by telegraph might have been given to the commandant of Port Arthur of what had passed at St. Petersburg forty-eight hours before.

Some countries, in order to avoid any surprise, take, even in time of absolute peace, the most minute measures of vigilance and precaution. This is what the English do at Gibraltar.

### **What are the Effects of War?**

Its effects are of two kinds; domestic and international.

The first has reference purely to internal law, which varies with different countries and serves to place a country in a status which may change to a greater or less extent its domestic arrangements, from what they would be normally in time of peace. Such would be in certain countries, the taking over of the railroads by the government, the calling to the colors of the able bodied male population, etc. In the United States it would put into effect certain articles of war which are dormant in times of peace; in other respects a state of war would practically make no changes, in the absence of specific legislation, in our internal conditions.

We will here consider, however, only the international effects of war.

What are these effects? They are of the first importance, and it should be remarked that they concern, not only the relations of belligerents between themselves, but also the relation of belligerents with other countries.

Sometimes it is thought that the situation of a neutral state may be indicated by the very term—but this is an erroneous idea, since the status of neutrality creates obligations, and, from this it follows that a neutral state must maintain certain rights and exercise certain duties. A neutral state has the right to inviolability for its territory, and may enforce the right by arms, but nothing in time of peace prevents it from suspending the exercise of the right. If there be a war, however, and a nation remain neutral, the right of inviolability which exists in time of peace will continue, and carry with it the obligation to sustain such inviolability, in order to prevent its territory from being crossed by one of the belligerents. In olden times war was looked upon as a struggle of all against all. This idea, which obtained for a long time, was given up as the result of certain very clear rules formulated for the first time by Jean-Jaques Rousseau, and taken up in the same form sometime afterward by the jurisconsult Portalis. Under these rules it is admitted that war is a relation existing between state and state, and that it is armed forces struggling against other armed forces. As a result we have been brought to the point of establishing a distinction between active and passive enemies. Consequently the inoffensive inhabitants of a country must be respected.

### **The Breaking of Official Relations**

The first effect of war is shown by the rupture of diplomatic relations, if they have not been previously ruptured, and by the rupture of official relations,

which is not a synonymous term, because countries maintain commercial agents and consuls, who continue to exercise their functions (even in the case of a recall of ambassadors or ministers plenipotentiary) and who retire only in time of war. In such a case the archives are confided to a friendly power. To this power are also confided the interests of nationals living in enemy territory.

During the Spanish-American War, the interests of Spaniards residing in the United States were confided to the French and Austrian agents, and those of Americans residing in Spain to the English. In the same way, at the time of the Greco-Turkish War in 1897, the interests of the 200,000 Greek subjects in Constantinople were confided to the agents of France, England and Russia.

### **In the Case of a Union or of a Confederation**

It may happen that a belligerent is bound to another country so closely that one may ask if the new situation is not going to react upon this other state. Thus, if war is declared against a state which forms part of a confederation, what would the other states do? This depends upon the terms of the confederation. So in 1859, at the time of the war between Italy and Austria, which was a part of the Germanic Confederation, the other powers of the Confederation did not intervene, since Lombardy-Venetia, although belonging to Austria, did not form a part of the Confederation.

### **Treaties of Alliance**

It may happen that as a result of a treaty of alliance one of the belligerents is bound to another power. It then may be a question whether the *casus fœderis* has been reached. Everything depends on the treaty which has been concluded; but it should

be remarked that it is possible that the ally may in time of war retain its neutrality. At the time of the Russo-Japanese war, France, the ally of Russia, remained neutral.

What we must look at is the actual fact. A state is allied to a belligerent, it does not purpose taking part in the war, and the other belligerent must consider it as a neutral. While this belligerent may be familiar with the clauses of the treaty of alliance it may desire to do away with any doubt and insist upon the allied state declaring itself for neutrality, or the reverse. In general, it is admitted that a declaration of war is indispensable, and that a declaration of neutrality is not indispensable, since one may presume neutrality but wars have occurred where no declaration has been made.

### **Case of a Protectorate or of Vassalage**

The same question as in regard to an alliance may be raised if a state be placed, in relation to another, in a position of protection or of vassalage. In such a case one is still unable to establish an absolute rule.

If France were at war it would be hard to suppose Tunis and Annam neutral; both these countries being technically under French protectorates, and being garrisoned by French troops, I have used the expression "technically" because actually these countries are as much French possessions as is Algeria. Should the Philippines become a protectorate, they would be in the same position.

But there are other cases where the tie of protection is broad and permits neutrality to be maintained. Thus, the Ionian Isles, under the protection of England, during the Crimean War continued their commerce with Russia. England then seized an Ionian vessel which was going to a non-blockaded

Russian port; the prize court found England in the wrong, and the latter was obliged to release the vessel.

We may ask whether neutrality is possible in the case of a vassal state. During the Greco-Turkish War, Bulgaria deemed that it should remain neutral. The Greek agents continued to reside at Sophia. Egypt would have liked to have remained neutral, but after some hesitation, she had to pronounce herself for Turkey. The hostility of Egypt, however, was restricted to an abstention from diplomatic relations with the Greek agent, who discontinued his functions.

### **Effects of War on Treaties Previously Concluded Between Belligerents**

The generally accepted idea is that in time of war treaties between the belligerents, are, of right, annulled and broken. This was the view which prevailed at the time of the war between France and Germany. The admitted consequence is that treaties do not revive as the result of a return to pacific relations. However, there is a class of treaty in regard to which no doubt exists. Such are treaties, conventions, or agreements, made in view of war, and in which the belligerents are not the sole parties; for example, the convention of Geneva; in case of hostilities, treaties and conventions of this class remain in force.





## FOURTH LECTURE

### Situation of Persons

**A**T the moment when war breaks out, nationals of each of the belligerents may be established within the territory of the other. Their situation must be considered from two points of view: the relation of such persons to their own country, and their relation to the enemy state in whose territory they find themselves.

1. RELATION OF THE NATIONALS ESTABLISHED IN ENEMY COUNTRY, TO THEIR OWN STATE.— Their government may recall them. Napoleon I frequently used this right, and his decrees of 1809 and 1811, on this subject, are couched in terms of extreme violence. A state may forbid its nationals either to go to an enemy country or to remain there.

2. RELATION OF THE NATIONALS OF A BELLIGERENT TO THE ENEMY STATE IN WHOSE TERRITORY THEY LIVE AND ARE ESTABLISHED.—In olden times and up to the beginning of the XIX century they were recognized as prisoners of war. In 1804, at the rupture of the peace of Amiens, Napoleon I answered the violent measures of England by arresting 10,000 Englishmen, between the ages of 18 and 60, residing on French territory. In our days such a proceeding would not be possible. War does efface the effects of preexisting peace; war may not be retroactive, and besides, usually when foreigners establish themselves in a country it is under the protection of existing laws which do not contemplate the exceptional measures of which we have just spoken; often it is by favor of special treaties providing for such establishment.

The foreign nationals must be allowed to leave, even those who hold positions in the armies of their own country and who shortly will be actively engaged in fighting against the country of their late residence. In 1870 France hesitated in regard to the officers of the Landwehr. Finally, however, they were left free, and this was proper. The general development on the continent of Europe of universal obligatory service would render precarious the relations of citizens of the various countries should we return to the ancient custom.

But has a state the absolute duty of tolerating such foreigners in its territory? May it not expel them? Clearly, it *may* tolerate them, and then it has the right to watch them. Foreigners remaining in belligerent territory by their own will are subject to the local law and may not withdraw themselves therefrom, even under favor of a military occupation by an army of their own country. The Court of Nancy, after the war of 1870, made a remarkable application of this right in inflicting the penalty of the 77th Article of The French Penal Code upon a German, who, during the period of military occupation, thought he had the right to conclude a commercial venture in supplies with his own invading nationals.

In regard to the *right* of expulsion, it undoubtedly exists as a point of International Law; it is only just that it should be so. There may be serious danger in keeping in national territory, at the moment of invasion, individuals of the hostile state who, by uniting, constitute hostile centers or even centers of espionage and who, during the course of the war, one would be obliged to protect against the molestation of ones own nationals. While International Law however, would warrant the expulsion, the question of expulsion from the practical side, must depend on the municipal law of the country which desires to put

the right of expulsion in force. In the United States, for instance, I know of no law which would permit the expulsion of a foreigner residing peacefully in the country and committing no act of hostility, because such foreigner is a national of a country with which the United States is at war.

In each particular case the solution to be reached depends on the circumstances; in every war these vary, and besides, in the same war they are not identical for each of the belligerents; this renders impracticable, in the premises, the principle of reciprocity. During the Crimean and Austrian Wars, Russians and Austrians residing in France were not disturbed as their presence in that country was not disturbing, the wars being waged elsewhere. In 1870, however, the French felt constrained to expel all Germans from the city of Paris on the eve of its investment, although they were not necessarily expelled from the rest of France. Germany, on the other hand, allowed Frenchmen to remain within her borders; they were comparatively few in number and Germany was conducting the war in France. During the war with Spain I know of no case in which a Spaniard, because of his nationality, was expelled from the United States.

After the declaration of war of 1897 Turkey wished to expel the Greeks established in her territory; there were 200,000 of them, of whom 35,000 were in Constantinople alone. She gave them 15 days in which to leave. The protecting powers, however, intervened, with all the more authority since the Greeks in Constantinople were almost all employed by English, Russian or French commercial houses, the interests of which would have been gravely compromised by this sudden exodus. Besides, the war was taking place outside of Ottoman territory. Tur-

The foreign nationals must be allowed to leave, even those who hold positions in the armies of their own country and who shortly will be actively engaged in fighting against the country of their late residence. In 1870 France hesitated in regard to the officers of the Landwehr. Finally, however, they were left free, and this was proper: The general development on the continent of Europe of universal obligatory service would render precarious the relations of citizens of the various countries should we return to the ancient custom.

But has a state the absolute duty of tolerating such foreigners in its territory? May it not expel them? Clearly, it *may* tolerate them, and then it has the right to watch them. Foreigners remaining in belligerent territory by their own will are subject to the local law and may not withdraw themselves therefrom, even under favor of a military occupation by an army of their own country. The Court of Nancy, after the war of 1870, made a remarkable application of this right in inflicting the penalty of the 77th Article of The French Penal Code upon a German, who, during the period of military occupation, thought he had the right to conclude a commercial venture in supplies with his own invading nationals.

In regard to the *right* of expulsion, it undoubtedly exists as a point of International Law; it is only just that it should be so. There may be serious danger in keeping in national territory, at the moment of invasion, individuals of the hostile state who, by uniting, constitute hostile centers or even centers of espionage and who, during the course of the war, one would be obliged to protect against the molestation of ones own nationals. While International Law however, would warrant the expulsion, the question of expulsion from the practical side, must depend on the municipal law of the country which desires to put

the right of expulsion in force. In the United States, for instance, I know of no law which would permit the expulsion of a foreigner residing peacefully in the country and committing no act of hostility, because such foreigner is a national of a country with which the United States is at war.

In each particular case the solution to be reached depends on the circumstances; in every war these vary, and besides, in the same war they are not identical for each of the belligerents; this renders impracticable, in the premises, the principle of reciprocity. During the Crimean and Austrian Wars, Russians and Austrians residing in France were not disturbed as their presence in that country was not disturbing, the wars being waged elsewhere. In 1870, however, the French felt constrained to expel all Germans from the city of Paris on the eve of its investment, although they were not necessarily expelled from the rest of France. Germany, on the other hand, allowed Frenchmen to remain within her borders; they were comparatively few in number and Germany was conducting the war in France. During the war with Spain I know of no case in which a Spaniard, because of his nationality, was expelled from the United States.

After the declaration of war of 1897 Turkey wished to expel the Greeks established in her territory; there were 200,000 of them, of whom 35,000 were in Constantinople alone. She gave them 15 days in which to leave. The protecting powers, however, intervened, with all the more authority since the Greeks in Constantinople were almost all employed by English, Russian or French commercial houses, the interests of which would have been gravely compromised by this sudden exodus. Besides, the war was taking place outside of Ottoman territory. Tur-

key accepted these reasons, and the sultan withdrew his iradiè.

### Property

In regard to the property belonging to enemy nationals within the territory of a belligerent state, the same rule was formerly followed as was applicable to the persons themselves, *i.e.*, property became by the declaration of war, true *res nullius*. The English, in particular, had made of confiscation a well studied procedure of maritime war. At the beginning of a period of political international tension they commenced by placing an embargo on all commercial vessels of the adverse nation which were in English ports; in case war was declared, this embargo was transformed into a confiscation pure and simple. This system used to provoke violent reprisals, and to answer it, the revolutionary governments of France and that of Napoleon I placed under sequestration the goods of the English domiciled in France. The treaties of 1814 contain certain clauses relating to such property.

At the time of the Crimean War England and France inaugurated a system more in accord with justice. Not only did they not place an embargo on Russian vessels but they allowed them a delay in which to close out their operations and reenter their own ports. Again, in 1870, German commercial ships which were in French waters at the time of the declaration of war received safe-conducts and were enabled to regain in security, German ports. But let us hasten to say that this practice is entirely individual. No rule of international law imposes any obligation of safe-conduct or delay.

Without discussing the affair of Chemulpo, which was an unjustifiable one since it involved the threat of an attack on an enemy sheltered by a then neutral

harbor, the adversaries in the Russo-Japanese war allowed commercial vessels only very short delays and it would seem that a number of abuses of power were then committed. England, by the way, seems to regret the ancient practice. One of her jurisconsults—and he not an unimportant one—has not been afraid, in recent times, to set forth the following doctrine:

Since, in our days, commercial vessels may be readily transformed into rapid cruisers or ultimately serve as powerful means of transport, let us suppose that one of the belligerents has the luck to have, within its reach in its ports at the moment of political tension, a certain number of these vessels belonging to the nation with which it is about to go to war; will it allow them to escape? Such an act would be one of criminal folly.

In the Proclamation of the President announcing the Spanish War (April 25, 1898) thirty days were allowed to strictly neutral Spanish vessels in which to load or discharge their cargoes and leave United States waters.

The conference of The Hague, 1907, adopted a convention which is about what the French delegation had proposed, and by virtue of which commercial vessels which are not transformable into war vessels may have a delay as a matter of grace, and may not be confiscated. As for the others, the belligerent parties may appropriate them, paying an indemnity; the interests, both of belligerents and of commerce are thus taken into account. This convention is not what I will call a very strong one in its provisions, and has not been accepted by United States.

In that which relates to property on land, the most rigorous measure which was taken during the last century was the sequestration of which we have already spoken. This measure, even, is no longer in

practice and, actually, no nation claims a right to confiscate property belonging to nationals of the enemy. Besides, at the conference of The Hague, in 1907, there was inserted in Article 23 a prohibition against declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

### The Laws of War

Are there any laws of war? Or, on the contrary, should the liberty of a belligerent, as to the means to be employed to reduce the adversary, be unrestricted? In barbarous days the question was not even considered, and for a long time the adage obtained: "*Inter arma silent leges.*"

However, the progress of civilization led to the admission that war, if it confers rights, also imposes upon the belligerents certain duties; this condition of mind is made very clear by the fact that a single isolated act of small real importance, committed in violation of these duties, raises greater indignation than do the hecatombs of a great battle.

War may not lose sight of the facts on which are based international law, of the sovereignty of states, of their political independence, nor particularly, of their mutual economic dependency; war may not be conducted by a method of procedure in total opposition to the state of civilization which we have reached and to established custom.

A regard for all these facts has led to customs which have grown and been developed in the same ratio as a clearer understanding of the facts has grown and been developed.

Today, the right of war is dominated by two principles. The principle of necessity and the principle of humanity. These principles rest upon two essential ideas, the first, due probably to J. J. Rousseau,



is that war is a relation of state against state and not a struggle of all against all, an important idea in that which regards the relations of an invader with the inhabitants, who are only passive enemies in contradistinction to the soldiery, who are active enemies. The second is, that the purpose of war being to impose one's will upon the adversary, all acts foreign to this end or going beyond it, should be prohibited; unnecessary harshness must be avoided, and one must refrain from doing evil for the sake of evil; one must act in all this with a view to the normal condition of international relations—a state of peace—which would never be stable if unjustifiable cruelties in war were allowed to engender undying hatreds.

Under the empire of these ideas the usages accepted by the consent of all nations have little by little been determined and have assumed the force of law, thus establishing the rules of the customs of war which render war infinitely less hard than in bygone days.

From the time this was established, each government has been able to give to its armies instructions conforming to the principles of these rules. Such instructions, quite short when they are addressed to professional soldiers imbued with traditions, had to be more fully developed in order to be placed within reach of armies younger and more numerous. Thus, it was the United States government which first, at the time of the war of secession, gave to its armies prepared regulations (General Order No. 100). President Lincoln had to have prepared for his improvised troops, without traditions and even without discipline, instructions in regard to the conduct to be maintained against the inhabitants and armies of the enemy. It was a German jurisconsult, Dr. Lieber, then settled in America, who was charged with this task. His work, the true point of departure of the codification of

the laws of war, revised by a committee of officers, and then published, is a verbose document, confusing and in too great detail because it was addressed to an army without traditions and because it had relation to a special war. It is interesting, however, on account of having been the first which appeared on this matter and the first which considered most of the questions which later would be examined by the great international conferences. The document is unilateral and not international, and the instructions which it contains were again published by the United States at the time of their war with Spain.

What I have just said embodies the views of Prof. Renault which are, I think, open to some criticism. The idea that quite short instructions are sufficient for professional soldiers "imbued with traditions" may be true, provided that the traditions are to be maintained. If, however, a radical departure is made from those traditions it would seem that the new rules which are to take their place must be fully set forth. The traditions of the French army in the Palatinate can hardly have been of much use to the soldiers of the French republic or of Napoleon I, and the traditions of the armies of that emperor cannot have been of much use to the French troops in Crimea or in the war with Austria. Where a new departure is taken, or where a somewhat elastic set of unwritten rules are replaced by a code of positive requirements, it is hard to see how the code may be epitomized, until all the principles it contains have been fully made known. It is true that where professional armies exist there can be a division of the rules, the officer acquiring *all* the rules and the enlisted men being furnished with only such items of the code as are required for their personal guidance. Under this reasoning it would seem proper that officers charged with the instruction of enlisted men should

eliminate from the course of instruction those rules which the enlisted men cannot be expected to need. Under our American system when war comes, the country is largely dependent for a time on an amateur army which must learn at once in regard to things military, all that which should demand the study of a lifetime. In the case of General Order No. 100, there was a twofold object. First, the education of an army in which a vastly preponderating number of officers and men had previously given no thought or study to the laws of war, and second, the establishment in a written and codified form of customs and principles which up to then, had never been formulated. To these objectives the work of Professor Lieber would appear to have been singularly well adapted. I may add that the instructions formulated by England and France (1913) in conformity with Article 1 of The Hague Conference on Land Warfare, are quite as voluminous and verbose as were those contained in G. O. No. 100, if not more so.

Other efforts to establish regulations have been made in different countries. It is thus that the French "Service en Campagne" contains certain points, very succinctly stated, of international law, and that, since 1877, France has possessed a manual of international law for the use of land armies, prepared with great care by Mr. Billot. A similar manual appeared in Italy in 1884. We have "The Laws of War" published as a part of our "Field Service Regulations."

Since then the question has been raised as to whether it were better to stop there and to leave to each government the care of tracing, for its own armies, particular rules, or whether it were preferable to evoke, in time of peace, an international understanding in order to enter into reciprocal engagements—in other words, to substitute a written law of war for the custom of war.

Notwithstanding opposition, based either on the suggested necessity of allowing the laws of war to follow a free system of evolution conforming to the constant progress of civilization, or, on the contrary, on the advantage of allowing to war all its horrors, in order that we might see it disappear the sooner, the idea has prevailed that it was best to have precise rules rather than uncertain customs and the effort has been made to fix, by international agreement, universal rules of international law for time of war.

The first effort to establish regulations dates from the Declaration of Paris (16th April, 1856) which decided, in maritime war, on the suppression of privateering, a decision soon ratified by all the states represented at the congress and later even accepted by those which were not represented (Spain, the United States and Mexico excepted).

Then came the Convention of Geneva, due to the initiative of Switzerland supported by Napoleon III, and now accepted by all the states of the world. This convention had for its purpose the amelioration of the condition of wounded soldiers of armies in campaign, and transformed into a legal obligation a duty, which up to that time had been only a moral one, making it incumbent upon the conqueror to care for the enemy and establishing, in the interests of the sick and wounded, certain immunities for the sanitary personnel (22d August, 1864). This convention was replaced by that of the 6th July, 1906.

From this on, it is to the persistent initiative of Russia that we owe all the ameliorations brought about in the laws of war. In 1868, the Czar Alexander II convened an international commission which formulated the Declaration of St. Petersburg (11th December, 1868), which only bore, is it true, on a very specialized point, the prohibition of the use of certain

explosive projectiles, but which was accompanied by very important general considerations.

In 1874 the same sovereign led the way to the meeting of an international conference for the purpose of determining a basis for the law of war on land. The Conference of Brussels, held in July and August, 1874, under the presidency of the Russian Baron Jomini, and composed of military men, of diplomats, and of jurisconsults, formulated an elaborate project which was inspired by our General Order No. 100 of 1863.

But in the discussions an antagonism of ideas was soon seen to arise between the great states and the smaller ones, the latter sustained, by the way, by England. The great powers desired to concentrate the effects of war upon the active belligerents and to admit a struggle only between organized forces. The smaller states, on the contrary, which were only capable of engaging in a defensive war, did not wish to renounce the right to call on their populations to repel an invader, and they asked themselves if the result of certain of the rules which it was desired to establish would not go to strengthen, by law, the actual superiority, already so marked, of the great powers. It was possible to reach but one project; another conference which it was proposed to hold at St. Petersburg was to transform this into a definite convention. The additional meeting did not take place, England having called attention to the fact that there had come into play interests of too contradictory a nature to end in an unanimous understanding and having refused to join the conference.

The work of the Brussels Conference is, none the less, of considerable importance, since it was the result of an international inquiry in which were joined the most competent men, and also because the various governments became inspired by it to pre-

pare the private regulations of which we have already spoken. Certain states at the outbreak of war have declared themselves as desiring to conform to the resolutions adopted at Brussels. Thus Russia, when it entered into a struggle with Turkey in 1877, declared that it would apply these rules, and in 1881 appeared a Russian work by de Maertens, giving very interesting details as to their application during the campaign.

### **The Hague Convention**

The foregoing project was again to be taken up and rehandled in 1899, at the time of the First Peace Conference. An understanding was reached, thanks to the skill of the president of the conference, who changed the order of the articles and devoted himself to presenting first for discussion those on which an agreement would be easy, the remainder were later readily accepted.

The convention comprised two parts:

1. A convention with a small number of articles.
2. A set of regulations annexed thereto containing about sixty articles.

### **The Convention**

In the first part the high contracting parties engaged themselves to give to their troops instructions in conformity with the regulations annexed to the convention. They thus entered into an obligation, and this obligation, an absolutely juridical one, is accentuated in the second article, which sets forth that: "The provisions contained in the Regulations referred to in Article I, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."

The convention as a whole is, according to a well chosen expression used at the time, "a mutual assurance against the abuses of war."

Nevertheless, the Great German Staff (Historical section) published in 1902, as what may be called internal regulations, "The Laws of Continental Warfare," in which the convention of The Hague is spoken of in the same terms as was the project of the conference of Brussels. A moral value only appeared to be attached to it. Certain jurisconsults took up this fact and in 1907, at the time of the Second Hague Conference, the question was considered. With great skill the German delegation took the advance and submitted to the conference an article which was inserted in the convention. According to this article: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." The obligatory nature of the convention was thus, by the indemnity provision, rendered clear and positive.

The rules of 1899 were revised in 1907, but no really essential changes were incorporated. However, we will call attention to certain improvements.

Governments have the greatest interest (pecuniary and moral), in bringing the regulations with which we are concerned to the knowledge of their troops and not wait for that purpose until the moment of war. A moral training is necessary, practiced for a long time in advance, if we are to hope that armies will respect the laws of war. Notwithstanding all precautions, however, we must not expect too much. Unexpected cases will present themselves.

Each belligerent will have great interest in himself observing these laws of war, and, when confronted by an adversary who may appear to have

violated them, a belligerent must be careful to act without precipitation; he must examine things equitably in order to formulate later only claims which will be entirely justified.

### **Rules Annexed to The Hague Convention**

These rules cover two main questions;

1. Hostilities.
2. Military authority in enemy country.

#### **Hostilities**

This subject is itself subdivided under two heads:

1. The definition of the nature of a belligerent.
2. In what hostilities consist.

#### **Of Belligerents and Enemies in General**

From the actual idea of war—considered no longer as a struggle of all against all, but as a relation between state and state—there has been born an important distinction to be made between the nationals of a state at war, in order to know which of these may take part in hostilities, and which are those against whom hostilities may be taken. To all the nationals of a country with which one is at war the term “enemy” is applicable; but certain of them are active enemies, and others, passive; certain of them are combatants, and others, non-combatants.

The first, the agents of the state both in attack and defense, may take part in hostilities and hostilities may be waged against them; they are subject only to the laws of war and not to the penal laws; if they fall into the hands of the adversary they may be prevented from again taking part in the struggle; they may be held prisoners but they may not be subjected to penalties; their acts of hostility are entirely lawful.



Passive enemies continue their pacific occupations, and, upon condition of committing no act of hostility, are respected by the adversary; an exception exists, however, as to the respect for what we may call their neutrality, in the exercise of the right of requisition, which weighs upon all the inhabitants of the invaded country whatever be their nationality, whether they be enemies or neutrals.

### Who Are the Belligerents?

First, all men of the regular army, whatever be its method of organization — permanent service, militia or volunteers, as the terms are understood with us and in England.

The characteristics of this army are:

1. A regular organization by the state.
2. A common authority and discipline.
3. A uniform.

FOREIGN CONTINGENTS.—A belligerent *may* include within its armies any individuals whom it sees fit to take. It is not for the enemy to make a distinction. In certain armies there are to be found only nationals; this is the French and German principle. Nevertheless, France has a Foreign Legion, which is intended for service only in Algeria or in the colonies. As a matter of fact, the Legion should not serve in a European war, because it contains Alsace-Lorrainers, Germans, Englishmen and other foreigners. The nationality of these Alsace-Lorrainers remains doubtful, as a result of a difference in the interpretation of the treaty of Frankfort by the two contracting nations. For foreigners employed against their nation of origin the case is covered by Art. 23, of the rules of The Hague:

“———. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part

in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."

To hold otherwise would be contrary to moral sense and the to most elementary principles of international law, because a belligerent would have the right to consider, and to treat, as traitors, its nationals engaged in war against it.

COLONIAL CONTINGENTS.—What should be said of colonial subjects, of an inferior degree of civilization, as to whom it is more difficult to guarantee a respect for the laws of war? In regard to this France was reproached in 1870 with using Turcos, and England with using Indian troops and Kaffirs during the South African War. It cannot be said positively that there is in this anything contrary to international law. It depends on the organization adopted. If a formation is determined by means of elements from the regular army there will then be all the desirable guaranties from the standpoint of the laws of war. The practice therefore, cannot be forbidden. It is probable that the Philippine Scouts would be considered as coming within the last mentioned condition.

FREE COMBATANTS.—Here the difficulties are more serious in that it concerns troops not armed by a state, but free corps, partisans, francs-tireurs, guerrillas.

In so far as regards "partisans" we must avoid misunderstanding the term, which is sometimes used in an entirely special sense to indicate those detachments of the regular army employed, most often temporarily, in carrying out a special mission. These detachments have, therefore, nothing in common with the partisans who are free combatants.

Such corps may, in a defensive war, render great service, worrying the enemy, capturing his convoys, intercepting his dispatches, thanks to their great

knowledge of the country and to the willing assistance of the people. The recruitment of these casual troops is of a doubtful nature; the discipline among them is feeble. The harm which such elusive combatants do to the regular troops of the enemy is sometimes very great, producing in the latter an irritation which sometimes takes the form of violent reprisals.

The formation of these free corps at the moment of a war will depend very much on the regular organization of the country. It is very clear that if all the live forces of the country are incorporated in the army, but few elements will be left for these independent or voluntary formations. In the countries, on the contrary, possessing a small regular army, the free corps may take on a great importance.

The interest of the great military powers, who keep up large armies, is to restrict the quality of belligerents to the organized troops. These powers will fulfill most often the rôle of invader, in which they will employ only their regular troops, whereas the invaded people will try to oppose to the invader all the live forces of the country by allowing independent volunteers, urging, if necessary, their being raised and their resistance. There is, therefore, a very marked clash of interests between the greater and the lesser powers in regard to this question; this opposition manifested itself very actively at the Brussels conference.

At The Hague they arrived at an understanding which enabled them to define the characteristics which volunteers, in the continental sense, must present in order to be comprised among the belligerents. Articles 9 and 10 of the Brussels project passed almost literally into the Convention, being unanimously adopted and constituting Articles 1 and 2.

This convention imposes upon the volunteers the requirement that they shall satisfy the following four conditions, in order to be entitled to the quality of belligerents.

1. *That they shall be commanded by a person responsible for his subordinates.* The project submitted to the conference of 1874 went beyond this and required that they should be in submission to the chief command. This condition is clearly desirable, but will not always be possible. It follows that at The Hague Convention only those cases of honest resistance, which are organized without keeping in touch with the central power, were considered; all that was asked was that such resistance should be placed under the direction of a *responsible chief*.

During the Franco-German war of 1870 the French maintained a large number of free combatant bodies. The foregoing conditions were generally observed by them. This did not, however, prevent the Germans from demanding of these volunteers their authority, or their individual orders for taking up arms. This action has been much criticised, even by the German commentators.

All students of the history of our Civil War will remember the confusion which obtained in regard to the status of various free corps which fought for the Confederacy, and how hard it was in certain cases to discriminate between partisans who had the true authority of their government and those who were merely bandits. The need of a rule of differentiation was clearly apparent, and I for one fail to see how the modern views of The Hague Convention are to be sustained unless free corps and the members thereof be required to identify themselves as coming properly within the rules. Any one can get together something in the nature of a uniform and claim to be attached to a reputable command.

In considering the term volunteer as understood by most Europeans we must remember that it does not apply to the American volunteer, as the latter is a regular mustered-in portion of the army. The English volunteer is quite nearly akin to our National Guardsman or member of the organized militia in that he voluntarily devotes some of his time to drill and military instruction without in any way being obliged to do so. The English also have, it may be stated, a militia which is an enlisted force existing in time of peace as well as in time of war, and subject at all times to the orders of the Government.

2. *That they shall carry arms openly.*

3. *That they shall have a distinctive emblem visible at a distance.*

These two conditions in reality form but one: they follow the same idea, that there must be no question in regard to the quality of the active belligerent. The distinctive sign is not necessarily a uniform, but it must be sufficiently determined and visible to prevent the same individual from passing in an instant from the rôle of an active belligerent to that of a passive enemy.

4. *That they shall conduct their operations in accordance with the laws and customs of war.* There is a grave criticism to be made of this fourth condition which may lead to misunderstanding. By including it among the indispensable characteristics for qualifying a belligerent, we seem to give the right to refuse to recognize as such a corps of volunteers in which individual abuses might have been committed. There is no reason for providing for volunteers a treatment different from that which is applied to regular troops; individual abuses should only lead to individual punishment.

### Volunteers in Maritime War

Volunteers are not allowed in maritime war to the same extent as in war on land. Those volunteers who in the old days were called corsairs (privateersmen) played, nevertheless, a glorious rôle, and often exercised a great influence on the conclusion of peace, particularly in the XVIII and early XIX centuries. By letters of marque from their governments they were authorized to pursue the enemy and so to assist the navy; unfortunately, the enterprise of privateersmen was not based on entirely disinterested motives, and the spirit of lucre overcame that of patriotism; the prizes were allotted to the captors after trial in a prize court. At privateering ports large fortunes have had for their origin the products of cruises.

Privateering caused great difficulties to arise when the right of policing neutrals was given to privateersmen, and it was not long after that that they deteriorated in public opinion. During the same period a tendency towards respect for private property was becoming more marked, and pillage and booty were abolished on land.

During the war against Russia (Crimean War) France and England agreed not to give out letters of marque.

Article 1 of the Declaration of Paris of 1856 abolished privateering. On this condition England admits the principle that "The flag covers the merchandise." Alone, the United States, Mexico, Spain and China would not give up privateering. In our days privateering has almost entirely disappeared, and in the Spanish-American conflict of 1898 the two powers, which had not signed the Declaration of Paris, nevertheless decided that they would not have recourse to the practice.

As we have already said, while the United States was unwilling to jeopardize its position at sea by renouncing the assistance of privateers, it was willing to agree to a rule that private property at sea should be respected as is private property on land. Had this rule been accepted, there would be no more privateering, as the object of those ships which carry letters of marque, is to profit from the captures they make. Privateersmen sail at their own expense.





## FIFTH LECTURE

### Levées en Masse

**W**HAT should be said of *levées en masse*? The term has been employed to qualify very different conditions with the result that the same rule cannot apply to all cases.

Sometimes it is a general mobilization, attempted by a government with the object of procuring troops more or less well drilled, but answering all the requirements of international law for the formation of an army regularly organized. It was under these conditions that the Government of the National Defense in France, on November 2, 1870, mobilized all the available men from 21 to 40 years of age. The prefects of departments were charged with organizing them; their pay, their clothing, and arming were provided for. It was, in law, a true regular army.

But a *levée en masse* does not always have this character; it may happen that spontaneously, or on the initiative of the government, the entire population rises and casts itself upon the invader without having had time to organize. It was thus with those who revolted in the Spanish campaigns against King Joseph. It was the same in Prussia in 1813, where the orders putting in movement the landsturm clearly indicated that it was intended that it should fight in an irregular fashion:

“At the approach of the enemy all the inhabitants should arm themselves and endeavor to damage him by every means.”

Besides this it was recommended that the inhabitants, in order to protect themselves more easily from reprisals by the invader, should carry no distinctive sign. It was only natural, therefore, that the status of belligerents was refused them, since they themselves repudiated it, and that they were in many cases executed.

The recollection of 1813 did not prevent the Germans from showing themselves very severe in 1870 in regard to the franc-tireurs, who, however, fulfilled conditions which had not been fulfilled by the landsturm. At the interview of Ferrières, Bismark having declared that the francs-tireurs should be treated as assassins, Jules Favre recalled to his recollection 1813, and drew attention to the fact that in so treating the Frenchmen who had thus openly defended their country he was placing himself beyond the law. Bismark was not very sensitive to such appeals.

The question of *levées en masse* was extensively considered at Brussels in 1874. The small states, exposed to invasion, did not wish to give it up; and England, having joined in their views, the conference failed.

At The Hague (Art. 2 of the Rules of the Convention) it was admitted that the population of a territory *not occupied* which, upon the approach of the enemy, spontaneously takes up arms without having had the time to become organized in accordance with Article 1, shall be considered a belligerent, if it carries arms openly and observes the laws of war.

This article certainly does not apply to the peasant, who, between two shots, returns to his plow, since he acts with perfidy. But it does apply to a village which, on the point of being invaded, clearly shows an intention to defend itself. If the

invader triumphs and captures the defenders without uniforms, he must treat them as belligerents. In this case circumstances will have been such that there was no surprise for the invader; the laws and customs of war have been observed.

The case of *levées en masse* in occupied territory was not considered by The Hague Convention, because the convention would have run up against difficulties which could not have been solved. The question, therefore, is not determined as to this particular case; but it was with this possible case in view that there was introduced into the preamble to the convention an appeal to the sentiments of justice and humanity of belligerents in the hope of settling all difficulties which the text of the convention did not cover.

### **In What May Hostilities Consist ?**

May a belligerent employ every means of offense? For a long time the true nature of war has been recognized; war is a relation between state and state and not of individuals between themselves; its purpose is to bring the adversary to terms. From this it results that one may not do harm for the sake of harm. These principles had already taken form in the transactions of the Declaration of St. Petersburg of 1868; it was said therein that one may not cause unnecessary suffering to the enemy. The Convention of The Hague formulates positively the general principle as well for war on land as for war at sea.

Belligerents have not an unlimited right in regard to their choice of methods of harming the enemy. The restrictions are based on the two following ideas:

1. Barbarous methods must be refrained from.
2. Perfidious methods must be refrained from.

BARBAROUS METHODS. — Barbarity is not always easy to distinguish; the methods employed in war are in themselves barbarous. Where shall we place the bounds which must not be passed? This has been a very delicate line to determine.

We must consider as barbarous the use of projectiles causing incurable wounds, which are therefore more than sufficient to place the adversary *hors de combat*. It must be the same with regard to engines which would unnecessarily reach inoffensive persons; but this case carries with it difficulties which will be examined later when we treat of bombardment.

The Declaration of St. Petersburg of 1868 forbade the use of projectiles weighing less than 400 grammes (about 14 ounces) charged with explosives, fulminating or inflammable materials; the limit of 400 grammes excludes the question of artillery projectiles.

This declaration is of course obligatory only upon the contracting parties and then only in their reciprocal relations. A signatory state, as against a non-signatory state, may, from the standpoint of law, use any explosive projectiles. Thus, when England made use of bullets which were said to be explosive against natives in India, she may have violated the sentiments of humanity, but she did not violate the Declaration of St. Petersburg.

The bullets employed by England, more generally known under the name of *dum-dum* (the name of the place of their manufacture near Calcutta), are projectiles with a leaden core covered with a harder metal having longitudinal incisions—an envelope the thickness of which diminishes as the end of the bullet is approached and disappears entirely at the end (soft nose bullet). These bullets, without explosive force in the sense of the Declaration of St. Petersburg, expand in the body, and when they go through the

tissues cause, at the outlet, much graver wounds than where they enter. The English insisted that these projectiles were necessary for them in India, because ordinary bullets of small caliber did not have sufficient stopping power against fanatics.

A very lively discussion arose between the Russian and English delegates in regard to the question of whether or not these bullets were included in the Declaration of St. Petersburg. On the recommendation of the Russians, The Hague Conference adopted, by a very large majority, a supplemental declaration having for its purpose the prohibition of the bullets in question. Neither England—followed in this by Portugal—nor the United States signed that convention. It has been thought, and with reason, that the obstinacy of Russia on this point was unskilful from the standpoint both of politics and of law. From the standpoint of politics it had the result of alienating England and of hurting its feelings, which was regrettable. From the standpoint of law it became impossible thereafter to maintain that expansive bullets should be considered as within the category of explosive projectiles prohibited by the Convention of St. Petersburg. England, therefore, was no longer obliged to concern itself with the question, which before then had obtained, as to the legality of the use of dum-dum bullets. As it did not sign the convention, it had the right in law to use them in case of an European war.

England had, however, very fortunately, to take into account the moral effect produced on public opinion by these discussions. It abstained from using expansive bullets in its war with the Boers. Still better, it adhered with vehemence in 1907 to the special convention of 1899. Portugal imitated England, with the result that today the United States

alone has declined to join in the prohibition of expansive bullets.

The United States was not represented at St. Petersburg in 1868. If at the First Peace Conference at The Hague the American delegation opposed the resolution proposing to prohibit the use of expanding bullets, it was because the delegation believed that the prohibition should be couched in general terms and not describe a particular form of forbidden projectile, thereby by implication permitting the use of others of a different construction. General Crozier, our military delegate to the First Peace Conference, offered to the resolution an amendment which was general in its terms and which would have rendered unlawful the use of any form of expansive or explosive small arms projectile. The amendment, however, was not accepted.

The necessity for a specific rule in regard to explosive or expansive bullets is no longer apparent since Section (e) of Article 23 of the Convention of 1907 forbids the employment of "arms, projectiles, or material calculated to cause unnecessary suffering."

Nevertheless, in order to take into consideration the desire not to limit the prohibition of explosive projectiles to those weighing less than 400 grammes, the contracting parties reserved to themselves the right to reach a later understanding whenever a concrete proposition should be formulated with a view to ameliorating the methods of offense.

Along this line but two declarations, of relatively small importance, were reached at The Hague, bearing on balloons, and on certain projectiles.

**PROJECTILES THROWN FROM BALLOONS.**—As to balloons, a declaration was made under which the signatory powers forbade themselves, during five years, to discharge projectiles or explosives from

balloons (or from other new craft of a similar nature) on high. The Belgian delegation took the initiative, at the conference of 1907, in renewing, purely and simply, this declaration, which had expired during the year 1906. England supported the motion, which had no other purpose in the minds of its authors than that of giving scientific aerostation time in which to develop in those countries where it was behindhand, in order that ultimately there might be a discussion of the question on an equal footing. France objected flatly to the Belgian motion, laying stress on the argument that it is hard to see why it should be made impossible to do those things from balloons on high which the 25th Article of the convention of 1899 allowed to be done from the earth. Germany ranged itself with the French opinion, together with six other powers. Only 29 powers renewed the declaration of 1899 regarding balloons.

**PROJECTILES CONTAINING DELETERIOUS AND AS-PHYXIATING GASES.**—Another declaration was made having for its purpose to forbid the use of projectiles of which the *sole purpose* should be to spread asphyxiating or deleterious gases.

Most of the states signed these two declarations. England signed neither one nor the other, and the United States did not sign the second. The reason for this second prohibition would seem to involve the possibility of non-combatants being affected.

Article 22 of The Hague rules specifies that all methods of injuring the enemy are not admissible, that there are certain of them which are barbarous and perfidious and should not be employed. Aside from those which have already been indicated, we may cite:

1. The refusal of quarter.
2. Useless destruction.

**THE REFUSAL OF QUARTER.**—Article 32 of the rules of The Hague declares improper a refusal to grant quarter. When an enemy has laid down his arms, has surrendered at discretion, or has been placed by a wound in a condition making it impossible for him to continue the struggle, the war, in so far as he is concerned, has reached its object; it is then no longer permissible to take other measures than those necessary to prevent his further participation in the hostilities.

The refusal to grant quarter is not rendered justifiable by a declaration made in advance that one will not ask quarter for one self. There is in history many a recollection of barbarous measures ordered by the public authorities. It is to be remarked in this regard that civil authority has often shown itself more cruel than military authority. Thus, the French Convention decided several times that no more Spanish prisoners should be taken; this decree was adopted, but, it may be said, never executed, the generals having refused to obey it.

Are there cases where one has the right to kill a defenseless enemy—to put to death prisoners? We may remark that there might be aggravating circumstances—perfidy, if they have been promised their lives. We are not here concerned, of course, with escaping prisoners or with those who have committed murder, but with those who cannot be guarded. It is thus that Napoleon, after the taking of Jaffa, caused to be massacred several thousand prisoners to whom, perhaps, their lives had been promised, but who he could neither guard nor subsist, who he could not return to Egypt, and who he did not desire to return to the ranks of the army which he was fighting.

During the war in the Transvaal the Boers often captured detachments of English which they sent



back without requiring anything of them. One can not send back a man and say to him, for example, "I forbid you, under the pain of death, to carry arms against me again," for the granting of freedom is an agreement which contemplates the free will of both parties. Besides, the Boers, while acting in a very humane manner, were also acting in a very wise one, since, evidently, surrenders would have been less frequent if soldiers had been convinced that by surrendering they were going to their deaths.

One must not do harm for the sake of harm, but limit it to that alone which is necessary to reach the goal, and it is, therefore, only in very exceptional cases that we may conceive a right to put prisoners to death.

**USELESS DESTRUCTION.** — One must also forbid the useless destruction of property. There are many kinds of destruction entirely proper in war, but it is forbidden to ravage for the sake of ravaging, as Louvois caused to be done in the Palatine (destruction of the castle of Heidelberg, etc.). The rules of The Hague (Art. 23) contain positive requirements in regard to this.

### **Siege Warfare**

In siege warfare the methods of destruction are particularly energetic and may give rise to difficulties in theory; it is here that the most violent means of coercion are put to work. The Hague Convention devotes several articles to it.

**WHAT CITIES MAY BE ATTACKED.** — In olden times a difference was made between fortified and open places. It is better to distinguish between cities which defend themselves, and those which do not defend themselves. Any city which defends itself, even though it be an open one, may be attacked; but one may only take possession of a city which does

not defend itself, without having the right to employ against it violent methods.

Article 25 of The Hague rules of 1907, prohibits the attack or bombardment *by any means which may be*, of cities or villages which are not defended. The addition, in 1907, of the words "by any means which may be" was made as the result of the demands of the French delegation and was intended to make up, to a certain extent, for the refusal by France to renew the five-year declaration of 1899 forbidding the discharge of projectiles from balloons.

In 1870 France was hotly critized by the Germans in regard to the bombardment of Sarrebrücken, August 2d, and of Kehl by the defenders of Strasburg. Since then, the Germans have recognized the grounds for these two operations as proper, Sarrebrücken being already occupied by them on August 2d, and Kehl offering, for their attack on Strasburg, an excellent cover.

At The Hague, in 1899, a lively discussion was entered into on the proposal of the Belgian delegation to forbid the bombardment of commercial ports. As a result of the remarks of the Italian delegation the question was set aside as pertaining to maritime war, and a "voeu" only was expressed (the 6th), which was considered by the conference of 1907.

The examination which was undertaken by this latter conference showed the question to be a complex one. No absolute principles may be laid down in regard to it; there are cases where the bombardment of a commercial port cannot be admitted, as, for example, in the coastwise war ("au littoral") advocated by certain sailors, who would hold the ports for ransom. But there may be a real military advantage in destroying a station, an embarking place, an arsenal or a factory. From another point of view a fleet may require coal or supplies, and would

not the only authority for such a requisition be a threat of bombardment? In recent naval maneuvers the fleets have acted as though the bombardment of commercial ports was permissible; the English have even looked upon it as a means of bringing a port to ransom. In 1870 France did not make use of the methods of a coastwise war.

In 1907, after much discussion, The Hague conference elaborated a convention (No. IX) which determines the question. Art. 4 forbids the bombardment, because of the nonpayment of money contributions, of ports, cities, villages, habitations or undefended vessels. Military and naval establishments and vessels of war which may be found in commercial ports are outside of the convention.

The rules therefore, must be adapted to the circumstances in which one finds oneself. A fleet not being able to land for the purpose of occupation should in certain cases be allowed to destroy.

### **Methods of Reducing a City**

The means which are employed are:

1. Investment.
2. Bombardment.
3. Assault.

**INVESTMENT.** —The investment may be partial or complete; but in that portion which the besieger commands he may enforce his orders and justify them.

It is necessary to draw a distinction between a land investment and a naval blockade. While the first may be, to all intents and purposes, absolute, the second will be fictitious over the greater part of the line. Command at sea is, as a matter of fact, less effective than on land; from this results a difference in the methods which are sanctioned. Thus, while the land besieger may put into effect such penalties as may seem proper to him, against those who

endeavor to cross his lines, the belligerent blockading a port may only confiscate the vessels which seek to force the the blockade, without being able to punish their crews.

In regard to an investment two questions present themselves:

1. The besieged may have a number of women, children, old men and wounded; he is unquestionably interested in getting rid of them. May he require from the besieger that they be allowed to pass?

At The Hague they did not consider this case. No rule can be established, and the question cannot be solved in advance. Useless mouths are a cause of weakness, both moral and material, and it seems proper that a besieger may refuse passage to them. It is a matter of consideration, and of humanity, of which he must be the sole judge. In case of the besieger's refusal, the commander of the place must keep these useless mouths, no matter what may the embarrassment which they cause him or the diminution in resistance which they may impose on the besieged place.

From another point of view, it is certain that the besieger may make a choice of the persons whom he is willing to allow to pass. A misunderstanding resulted from an article of the convention of Geneva of 1864, which stated that: "Evacuations, with the personnel which protects them, should enjoy absolute neutrality." The convention of Geneva of 1906 caused this mistake to be rectified by admitting that a convoy of evacuation encountered by the enemy is a "good capture." (This has relation to the evacuation of the wounded.)

2. During the siege of Paris there remained in the capital a diplomatic corps, which asked that on certain days it should be permitted to send out mail. Bismark allowed only open dispatches to pass; the

diplomatic agents protested. This protest was not well founded, because there may be an *absolute necessity* for the besieger not to allow communication with the outside to be established *even under diplomatic cover*. Alone, the diplomatic agents of the United States were exempt from this measure of suspicion, since they were charged with the German interests in France.

**BOMBARDMENT.** — In other days the efforts of the assailant were directed against the fortifications, the object being to make a practicable breach which would render assault possible. The progress of ballistics now permitting a more distant fire, fortifications today are but little attacked, and an effort is made to force the town to surrender of its own motion as the result of the development of artillery fire. Assault has been abandoned except as an unusual means, and the less perilous procedure of bombarding the interior of the place is employed.

Is this unlawful? It has been so held in France because of the effect on inoffensive inhabitants. General Faidherbe wrought himself up very much against the effects which the Germans expected from the bombardment of the city of Paris, that is, the pressure brought by the population on the governor to obtain the surrender of the place.

Is this pressure immoral or condemnable? It would seem not. It would be going very far to say that projectiles may not be thrown to the interior of a city, since to so hold would serve to establish a place of repose and of shelter for troops. Besides, in modern war it is not of the troops alone that we must demand courage; it is also of the civil population, which should be firmly persuaded that it is taking part in the war and that its attitude has an influence on the resistance.

In the French general instructions for siege operations, it is said:

“That bombardment consists in covering the place with projectiles as a whole or in part, for the purpose of ruining public edifices and to bring the governor to capitulate by intimidation or pressure from the population.” (1st part Art. 6)

The French have, therefore, made their own, the ideas which they repudiated in 1870.

Must bombardment be preceded, *necessarily by notice*? This notice has a double purpose. First, to make known to the city the risk which it is running and perhaps to bring about an immediate surrender if it does not desire to accept the danger; and second, and this is its true purpose above all, to permit the inoffensive portion of the population to place itself under shelter.

In olden times notice was given by a summons to surrender, after which, with a delay of a few hours, bombardment began.

In 1871 several towns received a preliminary notice, but Paris did not receive the benefit of one.

In principle, the notice should be given, but it may be necessary to act suddenly. The German Manual of International Law, published under the name of “Laws of Continental War,” lays down the rule that no notice should be given. But the principle of notice is found set forth in the convention of 1907. Article 26 of the rules says that:

“The officer in command of an attacking force must, before commencing bombardment, except in cases of assault, do all in his power to warn the authorities.”

The words of the French text of the Convention are “*attaque de vive force*.” Due to the poverty of our language this has been officially translated “assault,” giving, I believe, an entire misconception

of the meaning. Our general idea of a bombardment, in connection with an assault, is one carrying preparation, when, clearly, notice may be given. The idea of The Hague text is that where artillery fire is directed on a town suddenly as, for instance, where an attack which has started outside the town is followed up, no notice is required. This view has the advantage of making common sense out of the paragraph.

There are restrictions in regard to the scope of objectives in a bombardment. Certain of these restrictions result from the conventions of Geneva (1864 and 1906) and hospital edifices, marked by the Red Cross insignia are to be respected. Article 27 of the rules of The Hague has elaborated the principle by protecting edifices consecrated to worship, to science, to the arts, charitable institutions, and places where the sick and wounded are congregated on condition that they shall not be employed for a military purpose. It follows, as a consequence, that everything which is outside this list, including private habitations, may be bombarded.

The article (Number 27) also adds to the list of edifices to be protected as much as possible, historical monuments, and makes it the duty of the besieged to mark these edifices by a distinctive, visible, special and unique sign, and to notify officially the besieger thereof. It has been impossible to agree as to this sign; one of those which was adopted, in so far as regards maritime warfare (bombardment of coasts), consists in large rectangular panels divided by a diagonal line into two triangles of different colors (black above and white beneath).

The protected edifices must not be employed for a military purpose; this last condition is necessary. The Germans, in 1870, were reproached with the destruction of the spire of Strasburg cathedral; this action would have been justified if it were true as

alleged that the spire served as an observation point for the besieged. It would clearly be perfidious to indicate to the enemy, as a monument to be respected, one in which an observation station was established, or, for example, to cover by the Geneva cross a powder magazine; and it might be said that such an act would constitute a violation of a pledged word.

In this regard, in 1870, there were frequent recriminations which do not seem to have been justified. There may have been many errors, but it does not appear that, systematically, hospitals were fired upon.

**TAKING BY ASSAULT—PILLAGE.**—There is one particular situation to be considered—in olden times a frequent one, a rare one today—that of capture by assault. It has happened (even during the wars of the Revolution and of the Empire) that a city has been notified that if its resistance demanded an assault the garrison would be put to the sword and the town turned over to pillage. It was considered legitimate that such extreme measures should be taken and that a town captured by assault should lie at the discretion of the conqueror. In a spirit of vengeance or of cupidity the garrison was decimated and the town abandoned to pillage for a certain period of time.

These barbaric means are today prohibited. The besieger may not be the judge of the resistance to be offered by the besieged, whose strict duty it is to prolong the struggle as much as possible.

In the course of recent wars, but few towns have been taken by assault. In any case, Article 28 of the rules of The Hague forbids the turning over to pillage of a town, even when it has been so taken. In so far as concerns the garrison, it seems unnecessary to state that it should never be massacred or decimated, even in the case of a surrender without



conditions or of an attack by assault, of this the advance in manners and customs being a sufficient guaranty.

### **Of Methods Construed as Perfidious**

Over and above the methods called barbarous, belligerents may not employ certain other methods called perfidious, since these are forbidden by honor.

If it is difficult to classify the different methods considered barbarous, the actions of belligerents always implying a certain cruelty, it would seem that in regard to perfidious methods the line of demarcation is sharper.

We may classify perfidious methods in two categories:

1. Acts criminal in themselves.
2. Acts which constitute violations of a plighted word, or of conventions expressed or implied.

ASSASSINATION AND THE ENCOURAGEMENT OF ASSASSINATION are acts in themselves criminal. Their prohibition has been sharply specified by Article 23-b of The Hague rules, which stipulates that it is particularly forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army."

Thus, if a person should present himself to an enemy officer, hand him a dispatch, and stab him while he was reading it, he would be committing an actual crime. By the application of the same idea, the placing a price on the head of an enemy, which is after all but an invitation to assassination, is forbidden.

We must insist upon this point, because this procedure used to be employed. We have seen Napoleon place a price upon the head of the Prussian Major Schill, and the allies, a little later, place a price upon Napoleon's head. Since that time this practice seemed entirely abandoned, when in 1884

Admiral Hewett, of the British navy, placed a price upon the head of Osman-Digma, his adversary, whom he accused of attacking persons bearing a flag of truce. His act was generally condemned, even in England; and following a question in the House of Commons, the English government disavowed the admiral, while at the same time endeavoring to show, on his behalf, exculpating circumstances.

An assassin may not be held innocent because of the political character which he may assume. In particular, extradition may not be refused when an attempt against a sovereign takes on the character of a common law offense, a true assassination.

INSURRECTION. — May one provoke political crimes, such as insurrection or treason?

Under many circumstances it would be possible to stir up an insurrectionary movement among a people more or less under the power of one of the belligerents (Poland, Alsace-Lorraine, etc.). Of this history offers us quite a number of examples. England, in its various wars, has gone through insurrections in Ireland and India. In 1866 the Prussians tried to organize a Hungarian legion against Austria.

This method of procedure was particularly employed in the XVIII and in the beginning of the XIX centuries in the various struggles against Turkey, because of the peculiar situation of that country, which, not having attached to itself the conquered populations, is, after a fashion, camped on its possessions. It seems proper to mention particularly the efforts made in 1770 and 1877-78, to provoke an uprising among the Christian populations. Finally, at the beginning of the South African war, England, which claimed the right of suzerainty over the Transvaal, addressed itself to the population and called upon it not to respond to the call of the Transvaal government. A Boer general answered this

declaration by proclaiming, in his turn, that every Boer of the Transvaal who obeyed England would be shot and by endeavoring to stir up the population of the Cape Colony.

These are dangerous methods, which should be resorted to only in the last extremity. Their employment cannot be considered improper, since it is often very difficult to distinguish between a case in which one has aroused an insurrection and one in which one has only profited thereby. But in bringing on a rebellion one exposes the insurgents to the later vengeance of their sovereign; and it is not entirely certain that a belligerent could, the case arising, protect them against its adversary.

**TREASON.**—We can more readily understand the exciting to individual crimes and to acts of treason. We must consider the propriety of this means from two points of view; from the moral point of view, and from the practical point of view.

From the moral point of view there is no doubt that it is blameworthy to have recourse to corruption.

From the practical standpoint it must be admitted that the secret funds placed by various states at the disposal of their foreign ministers and their ministers of war, show clearly that every government has recourse to this method. One may not therefore renounce the method for oneself without running the risk of placing oneself voluntarily in a position of inferiority towards future adversaries.

**OF RUSES.**—If perfidy is to be condemned, ruse is admissible. Art. 24 of the rules of The Hague reads as follows:

“Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.”

We are therefore interested in distinguishing forbidden perfidy from permitted ruse.

We may say that there is perfidy every time there is a violation of a pledged word (expressed or tacit) of a convention, or of a recognized tradition.

Thus, to use the insignia of the Geneva convention to enable a train of ammunition to pass in the neighborhood of the enemy, to raise that insignia on buildings sheltering troops, or over a depot of munitions, or to have spying done by persons in the sanitary service, are perfidious methods. There is a breaking of a word pledged, since the insignia would thus be deflected from its employment in the interests of humanity and from its charitable purpose. In the same way in case of a truce, to reopen hostilities before the expiration of the time agreed upon would be perfidious.

Similarly, *an abuse of a flag of truce*. The fact of raising the butt of the rifle in the air, to indicate that one has surrendered, and then to meet the enemy with a point blank volley when he advances, are perfidious acts; this does not constitute a violation of a word expressly given, but of a usage, generally admitted, which indicates that it was the intention to stop the fight, to surrender. It is, therefore, an act of perfidy, and not a ruse.

THE USE OF THE ENEMY'S UNIFORMS AND FLAGS.—For a long time this was in question. There was here no convention either expressed or implied. Particularly, nothing forbade the use of the enemy's uniforms. But this dissimulation was required to cease from the moment the combat became engaged. There was a tendency to consider the practice improper; a tendency, by the way, accentuated by some military regulations. The question was one which demanded definite settlement.

The Hague rules cut short all discussion on this point. Art. 23-f provides that it is forbidden "To make improper use of a flag of truce, or of the

national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention."

On this point it is proper to note a difference between war on land and war at sea. Maritime regulations authorize ships to navigate under the enemy's flag, but forbid their fighting under that emblem. At the moment of combat they must raise the national flag. Besides, the flag indicates nationality only if it is sustained, at the moment of being hoisted, by a shot called a "coup d'assurance;" and until that shot is fired it may be considered that there has been simply a ruse. This "coup d'assurance" is like a word of honor given by the commander, that the flag properly indicates his nationality. We may remark that while it is easy for a vessel to change its flag rapidly at the desired moment, troops, on the other hand, can not change their uniform on the battlefield. The restriction, mentioned above had, therefore, in war on land no practical use.

**CALLS AND COUNTERSIGN OF THE ENEMY.**—May one deceive the enemy by imitating his calls? The question is not considered by The Hague rules. This ruse was frequently employed by the Germans in 1870. The method is unquestionably a proper one.

The use of the enemy's countersign and passwords is also admissible.

In these two cases there is no reason for establishing a distinction, as certain authors do, as to whether the knowledge of the calls or of the countersign has been obtained by treason or otherwise.

**THE SPREADING OF FALSE NEWS.**—This is a perfectly proper ruse of war, and may be an excellent method of action towards an impressionable people, who might be discouraged by false news. One may either allow messengers to be captured, or print newspapers, or circulate spurious editions of the enemy's newspapers.

The Germans, in 1870, had frequent recourse to this method. I believe that there are instances of its use during our civil war. It is legitimate when one does not assume responsibility for the false news. This ruse, however, would cease to be proper if the enemy which spreads the news should directly and solemnly assume responsibility therefor. Such would be the case of a belligerent who, to cause the other to surrender, should furnish him with false newspapers which he affirmed to be authentic. This, by the way, would not excuse the enemy's chief who, through this perfidy, should be led into an act of weakness. (A good illustration in regard to caution in this regard was shown by the Spanish commander at the siege of Baler, P. I.)

It is for this reason that we must condemn the artifice employed by Marshals Lannes and Murat in 1809, who, in order to seize the bridges of Vienna, falsely assured the Prince of Auesperg, who was charged with their defense, that an armistice had been concluded.

On the other hand, for the bearer of a flag of truce voluntarily to forget in the enemy's camp papers setting forth false news, would be a proper ruse. It may readily be understood that when an officer is charged with the mission of negotiating a capitulation there is for him an entire scale of shades between a clever dissimulation and a shameless lie.

(It will be observed that throughout these lectures I have used many illustrations taken from the Franco-German war of 1870-71. That war took place more than 40 years ago under conditions which permitted full light to shine on its incidents, and all the controversial points have been so fully discussed by the eminent jurists of both nations as to render the conflict an ideal one to illustrate the various phases and views of the laws of war.)

## SIXTH LECTURE

---

### Espionage

THE 24th Article of the rules of The Hague considers the necessary methods of procuring knowledge of the enemy or of the terrain as being closely akin to ruses of war. These methods come within the category of espionage.

The following fundamental distinction should be drawn in regard to spies: A spy may be, when he acts in the interests of his country, an estimable man, and even a hero. Such was the case, in the Russo-Japanese war, of the Japanese officers who penetrated within the enemy's lines to obtain information or to blow up bridges, and who, having been captured, died with the greatest courage. The Russians were authorized to execute them as a right of legitimate defense, but not because the acts of which they were accused involved moral turpitude. From a moral point of view we cannot treat such brave men with the contempt which generally attaches to one termed a spy. There would be a true crime, however, in a case where espionage was practiced by the subjects of a country to the detriment of their own nation.

We must, therefore, consider two basic cases:

1. The case where the spy in his actions does not fail in any duty of patriotism; where he serves his country. There is then but a non-criminal act of war.
2. The case where the spy commits acts of infidelity against his own nation; he then commits a criminal act—he *betrays his country*.

In the treatment and punishment of spies, no consideration would appear to have been given to this distinction, and while the moral standing of a spy who sacrifices himself for the good of his country and of the spy who betrays his country are actually as different as day from night, in the eye of the law no difference is to be made. It is probably that pure reason suggests that the traitor should be hanged as a punishment and that the enemy spy should be hanged for the effect *in terrorem*.

From the standpoint of the laws of war, the characteristics of a spy must be determined, because he will have no right to be treated as a prisoner of war. The spy is not always a despicable person—but he is always dangerous.

THE CHARACTERISTIC OF ESPIONAGE IS DIS-SIMULATION. —Thus officers and soldiers are sent out on reconnaissance with the duty of collecting information in regard to the enemy; if they go openly, in uniform, they may be fired upon or captured, but they may not be treated as spies; if, on the contrary, they are disguised, the dissimulation practiced authorizes the belligerent who captures them to try them as spies.

This distinction is clearly established by Article 29 of The Hague rules, which reads as follows:

“A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”

And the article further specifies that “soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies.”



OF MESSENGERS.—May messengers be treated as spies? The same article adds:

“Similarly, the following are not considered spies: Soldiers and civilians carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy’s army.”

The article thus applies to messengers the distinction which it establishes. If we consider, therefore, a staff officer carrying dispatches, he must, if captured, be treated as a prisoner of war. If, on the other hand, we consider disguised persons, who conceal themselves, they may be treated as spies. The danger in the latter case is very much greater; there is an act of perfidy which authorizes rigorous treatment.

AERONAUTS.—The siege of Paris raised a question in this connection—that of aeronauts. (We must not confound this question with that affecting the modern idea of the use of dirigible balloons or aeroplanes in war.) Up to that time only captive balloons had been made use of to observe the enemy. In 1870 the French made use of balloons to cross the enemy’s lines (five were captured by the Germans). There was evidently in this use of balloons an act of hostility, and the Germans did not hesitate to fire on them.

The first thought of Count Bismark was to treat as spies captured aeronauts; as a matter of fact, some of them were brought before courts-martial, and three of them were condemned to death; but none were executed. The action taken was deemed a mistake, even by the German jurisconsults, as it was impossible to say that the aeronauts were disguising their mission.

What is the treatment due to a captured aeronaut?

If he lands within the enemy's lines without having been seen, and if he then seeks to conceal himself in order to carry his dispatches to their destination he comes within the category of a spy. If he lands, voluntarily or involuntarily, within the enemy's lines, and does not conceal himself, he should be treated as a messenger accomplishing openly his mission. Today, in all the great armies, ærostation is a military branch; æronauts are thus military persons in uniform; in landing, therefore, they become simply military messengers. This latter view was accepted at the conference at Brussels and at that of The Hague (end of Article 29 of the rules.)

Dirigible balloons would appear today to be practicable adjuncts to war matériel, flying machines certainly are, and the time seems to have come when it is necessary to formulate rules for the use of the aerial domain, as well for time of peace as for time of war.

It may well be doubted whether it would be permissible in time of peace to hover in a balloon above a foreign fortified city or a fort; to do this would afford an easy way of taking panoramic views, and to cause, by this means, harm to a neighboring nation. So, we may also admit that, in time of war, a belligerent who commands a portion of territory owns equally the column of air which is above it and may, as a result, forbid æronauts to cross his lines overhead just as he forbids unauthorized persons to cross on land.

Finally, it is probable that if aerial navigation is perfected to the point where a struggle between aerial craft becomes possible, combats over neutral countries will be forbidden. It would be greatly to the public interest to have these different questions settled before vested rights render their solution more difficult.

JUDICIAL OBSERVATION IN REGARD TO ESPIONAGE.—The rules of The Hague have not fixed a punishment for spies, leaving them to be punished according to the laws of each country. In general, the applicable penalty is death, without allowing the particular circumstances of the case to be considered.

The rules of The Hague, as part of Art. 29 say:

“A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information *in the zone of operations* of a belligerent with the intention of communicating it to the hostile party.”

Art. 30 reads: “A spy taken in the act shall not be punished without previous trial.”

Two things are thus provided, first that from an international point of view a spy to be such must have done his work *in the zone of operations* and second, that there can be no summary execution even of a spy taken in the act.

Our existing law in regard to spies is much broader in scope; thus under Sec. 1343 of the Revised Statutes any person who is found lurking or acting as a spy in or about any of the fortifications, etc., *or elsewhere* shall be triable by General Court-Martial or by a Military Commission and on conviction suffer death.

Under The Hague Convention, were we, for example, at war with Mexico, and operating on the frontier of that State, a spy could only be one working within the zone of military operations, a somewhat vague term, but one of which the limits could ultimately be ascertained. We may admit that in such a case the city of Washington would be deemed to be without the zone. It follows that a Mexican caught lurking or spying in the War Department would apparently not to be a spy under international law.

So long as an apprehended spy is an American he is amenable to our laws and may be tried in accordance with our code, but where he is a national of the belligerent with whom we are at war, or of another adherent to the Convention, what law shall govern? Undoubtedly that established by The Hague Convention. If the supposed spy does not come within the purview of Art. 29 of the convention and yet is a foreign national who appears to have committed acts of espionage, he should not be held as a spy but as one who comes within the application of our "National Defense Secret" law.

Article 30 of The Hague rules forbids the punishment, *without a preliminary trial* of a spy taken in the act. It prohibits, therefore, the summary execution of spies as it does of irregular combatants.

This law, because it required the observance of the forms of a more or less hasty judicial procedure has often been violated; but a number of cases have sanctioned it; among others, the conviction of General Cremer, guilty of having caused to be shot without trial, at Beaune, an inhabitant of Dijon, against whom he had strong suspicions of spying.

To be punished, a spy must be taken *in the act*. The rules of The Hague (Art. 31) confirm this view:

"The spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war and incurs no responsibility for his previous acts of espionage."

It is this view which is emphasized in The Hague requirement that a spy must be taken in the act. It means undoubtedly that he must be taken during, what I may call, his spying tour; from the time the spy enters the zone of operations of his enemy until he leaves it, he is accomplishing *one act of spying*. Once this accomplished he ceases to be an apprehensible spy.

The article is explained *judicially* on the ground that the penalty pronounced against espionage being a necessary punishment, based upon the right of legitimate defense, the right of punishment is no longer justified when the attack ceases.

It is explained *practically* by the difficulty of proof when the alleged spy is not taken in the act.

It is here that the important consideration of the distinction between acts of *espionage* and acts of *treason* becomes apparent.

An act of treason may be punished when the offender is not caught *flagrante delicto*. It may be punished even when the war is over.

Professor Renault claims that the distinction between treason and espionage has been often misunderstood and cites in support of that view, Par. 104, General Order No. 100, 1863. This paragraph does not support the view of the great French authority. The paragraph merely provides that a spy or *war traitor* who having returned to his own army is later captured, may not be punished for his early crime but may be held in closer custody than other prisoners of war as "a person individually dangerous." We must bear in mind that treason as defined in our constitution has a specific, technical meaning and is not necessarily the crime committed by a "war traitor." Treason, as understood with us, is a breach of allegiance. A war traitor is one who commits treason under the laws of war and not under the constitution of the United States. While the inhabitants of occupied territory are said to owe a temporary allegiance to the occupant, such allegiance is quite different from that due to one's own government. Unless it be a case of domestic disturbance or where the United States is invaded, the presumption must be that a war traitor will be one who does not own allegiance to the United States in the sense

contemplated by the constitution and that the crime he commits will be more akin to espionage than to treason. I cannot see why a prisoner of war who has shown exceptional personal daring and enterprise in the way of penetrating our lines or otherwise acting in a manner to indicate very exceptional astuteness, should not be more carefully watched than need be the ordinary prisoner of war. We may, I think, safely conclude that what we call a war traitor must be considered as coming under the law applicable to espionage and not under the American doctrine of treason.

### Prisoners of War

**HISTORICAL.**—The condition of prisoners of war has varied very much during the ages. In the days of antiquity their fate was extremely precarious. They were put to death, as it was considered dangerous to allow them to live. Later it was considered preferable to keep them, in order to utilize their services, and slavery was established. In the middle ages a prisoner of war might buy his liberty by paying a ransom to the person who had captured him.

In the wars of the Revolution and of the Empire, captivity was generally very hard. It will be sufficient, to give an idea of this, to recall the memories of the English hulks and of Siberia. The British hulks in which many American prisoners were confined during our Revolution, and in which many died, are frequently brought to our memory. It is but fair, however, to reflect on the general conditions of life which prevailed at the end of the XVIII century and to realize that the comforts enjoyed by the persons best situated in those days were far below our present requirements, and that the position of

prisoners of war at the period was perhaps proportionately no worse than it is today.

During the XIX century the customs in regard to prisoners of war became entirely modified. The Crimean war marks the salient point of this evolution; the purely political character of that war favored this.

The war of 1870 called particular attention to the fate of prisoners of war. The unfortunate situation of the captive Frenchmen started a generous impulse in Belgium. A society was formed to assist them, and the general secretary of this society had the satisfaction of being able to cause the offer, by the Belgian delegation at the conference of 1899, of a project of regulations which was in part adopted.

GENERAL CONDITION OF PRISONERS OF WAR.—Generally speaking, the situation of prisoners of war results from the purpose of war, which is, to place the adversary in a position which renders him unable to take further part in the struggle. *A prisoner is a disarmed enemy.* Any violence towards him becomes improper; only such steps may be taken against him as are necessary to prevent his escape and his becoming harmful once more.

The rules of The Hague of 1899, in a series of articles, take into consideration the situation of prisoners of war. Previously, national regulations had set up, in regard to this, certain liberal and humane rules. Those of France, which became operative on March 21, 1893, were, at the conference of 1899, the object of great praise. Let it be well understood that in matters of detail such regulations are for interior order; it is essential however that they should be in harmony with the broad lines of the rules of The Hague.

The question presents itself as to who may be made a prisoner of war. Clearly, the situation of a prisoner may be more or less hard, according to the

individual. On the one hand, the status confers upon a belligerent certain privileges which are refused to those who might be convicted of perfidy, or to the irregular combatant, who does not come within the rules which we have set forth. On the other hand, it would constitute severe treatment for a civil functionary, who has the right to be free. The rules of The Hague do not decide the question, and we may still ask to what extent captivity may be imposed upon persons who are not active combatants.

It would seem, however, if non-combatants violate the laws of war, that they may be incarcerated as malefactors and that they are in no wise entitled to the benefits due a prisoner of war. If on the other hand they violate the civil laws under military government, their position is assimilated to that of civil prisoners and again they are not entitled to the status of prisoners of war.

It is a principle today that prisoners are in the power of the enemy state, and not of the individuals who capture them. They must not be maltreated; their personal belongings must not be taken; but their arms, their horses and their military papers may be confiscated. (Art. 4 of the rules of The Hague.)

In the case where the prisoner should carry a large sum of money, one may endeavor to ascertain if it belongs to him, because if it belongs to the state it would be a good capture; this is a question of fact. In any case, even if the money belongs to the prisoner, it is permissible, as a measure of precaution, to hold it for him as a deposit. This in fact would appear so advisable as to be almost a requirement. The mischief making power of money is so well accepted that for prisoners to be allowed to retain large sums would be to invite trouble for the captor.

To secure the safe-keeping of prisoners of war,



may they be imprisoned? Under Art. 5 they may only be interned in a determined place, under the obligation not to go outside of certain fixed limits. This measure is more or less severe, according to the country; there is no fixed rule. When security absolutely requires it, prisoners may be locked up, but this only while the circumstances which necessitate such a measure last. This clause was added in 1907.

As in regard to their internment, so also the *work of prisoners* is not subject to a fixed rule. The state may utilize the labor of prisoners of war but work is never imposed upon officers (addition made in 1907 to art. 6); and soldiers may not be employed at work having any connection with the operations of the war. Prisoners may be authorized to do work either for the account of the state or for the account of individuals, or for the account of the prisoners themselves. The money earned serves to better their condition, any balance being paid to them on their release.

The upkeep of the prisoners is a charge upon the belligerent in whose power they are (Art. 7). The question of reimbursement is to be considered at the conclusion of peace. A striking example is that of the very large indemnity which Italy paid under this rule to the Negus of Abyssinia.

Prisoners are subject to the penal laws and to the disciplinary regulations of the country in which they are captives.

ESCAPE.—An escape is not, in itself, considered a crime. One has the right to oppose it, even by violence, but if the prisoner is captured while in flight before having left the country, he may be punished only by disciplinary penalties (Art. 8) on the condition, however, that the escape has not been accompanied by any crime such as violence, corruption of

guards, etc., in which case it would be proper to apply the penalties of ordinary law.

In regard to persons who, after having succeeded in escaping, are recaptured with arms in their hands, they are not subject to any penalties because of their escape and must again be treated as prisoners of war.

Another question which raised difficulties in 1870 was, fortunately, determined by the conference of 1907—the position of escaped prisoners who seek refuge in a neutral country. Should the latter leave them at liberty or put them under guard? Which-ever it might do, it would be favoring one of the belligerents. It was necessary to trench the question in order to avoid future recrimination; it was decided that escaped prisoners who reach neutral territory should be left at liberty.

**LIBERTY ON PAROLE.**—Liberty on parole has often, and particularly in 1870, raised difficulties of great delicacy as regards the relation of the belligerent with those whom it has so liberated, or between the latter and their own government. Liberty on parole results from a contract—that is, from an agreement of the two parties; such is the fundamental idea. From this flow two consequences, which Article 11 has formulized:

1. A prisoner may not insist upon his being liberated, even by promising not to resume a part in the struggle.

2. A belligerent who of his own motion sends back a prisoner may not require of him a promise that he will not again resume arms.

The article itself reads as follows:

Article 11. "A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole."

This principle was applied during the South African war. The Boers not being able to furnish a guard for their English prisoners, released them purely and simply without requiring any undertaking from them.

But may a prisoner at all times properly enter into such a contract? This cannot be answered positively; it depends on the rules of his own country. These rules either authorize or forbid liberty on parole. In the first case there is no doubt, the government of the liberated prisoner is bound to respect the parole. But today almost all army regulations forbid liberty on parole.

In 1870 the French regulations were not sufficiently explicit. They did not contemplate the case of capitulation, and forbade officers to separate their fate from that of their troops, and consequently to accept liberty on parole. This, however, did not prevent certain commandants of forts from stipulating in their capitulation for liberty on parole for officers; this led to their being censured by the French Commission of Inquiry in 1871.

During our Civil War the question of paroling prisoners was fully provided for, and most minute instructions were issued (see for instance G.O. 142, W.D., September 25, 1862), but today no law or regulation of ours would seem to cover the point. The underlying principle, however, would appear to be that no officer or soldier may, without the consent of his own country, which he has engaged himself to serve, enter into an agreement with the enemy to avoid such service. The services which a paroled officer or soldier might render to his own army while the parole is in force would frequently not offset the burden to the enemy of having to guard and subsist him. Were the parole system rendered too easy, temptation might be offered to certain men to

place themselves in a position to be captured and then through the instrumentality of a parole return and be out of danger while others continue the fight.

The very general prohibition today of liberty on parole should be approved, because the situation of those paroled is always difficult and doubtful and may lead to grave embarrassments.

What would be, in regard to his own country, the situation of an officer who accepted liberty on parole against the laws of that country? He would first be amenable to a disciplinary penalty, the fault committed is one against discipline—of this there can be no doubt. But may the government decline to take into account the promise given by the liberated officer, consider him as entirely at its disposal, and oblige him to resume, at his risk and peril, his military service? Article 10 is not sufficiently precise on this subject. Its wording seems only to consider a case where the parole is given in conformity with the laws of the prisoner's country. And yet the government which would incorporate again in its army a paroled prisoner would violate a parole given, on which the enemy government has an absolute right to count. It seems more equitable, if it should not be desired to recognize the contract, to punish the officer who has made the mistake of accepting his liberty on parole and to reconduct him afterwards to the advance posts and turn him back to the enemy.

What is the exact bearing of the undertaking of one liberated on parole? This clearly depends on the terms of the contract. The formula employed will necessarily vary; it will be sometimes broad, sometimes narrow; it is important that it be precise. In 1870 the Germans required a paroled prisoner to do nothing more against the interests of Germany during the remainder of the war. This formula, very general in its terms, created, for those liberated, an

impossible situation holding them in absolute inactivity; because the Germans might have insisted that the officer, liberated under these conditions, enter into no employment, even one far from the theater of war, since this might serve to render another officer available to serve at the front; for example, were the paroled officer to serve in Algeria or in the colonies; to instruct recruits in the interior of the country, or even, up to a certain point, to fill a civil employment.

The danger of such indecision as to the bearing of the engagement will be avoided if it be simply stipulated that the prisoner who is being liberated shall engage himself to fight no more during the remainder of the war. He may then be utilized in special services which will not bring into play military good faith.

In regard to the relations of a paroled prisoner with the country which has placed him at liberty, Article 12 establishes as a principle that the violation of a parole given, carries with it the loss, not only of the advantages of liberty on parole, but also of the status of a prisoner of war. The paroled prisoner who should be taken with arms in his hands will be subject to the penalty which is set forth by the national regulations of the captor, generally speaking, this is the pain of death. The penalty could not be fixed by an international regulation; but the rules of The Hague forbid any summary execution, hence there must be a trial.

**ASSISTANCE FOR PRISONERS OF WAR — INFORMATION AND SUCCOR.** — Among the most cruel sufferings which war causes are those due to the uncertainty in which a prisoner and his family are placed so far as concerns their mutual fate during a prolonged captivity. There has been sought to create a system by which to minimize this unfortunate situation.

The rules of The Hague (Article 14) now render an information system obligatory. Each of the belligerent governments has to send to the other, lists of prisoners with an indication of the place where they are to be found. At the same time he must give notice of the names of those who may have been paroled.

Along the same order of philanthropic ideas, an effort has been made to encourage the organization of societies for the succor of prisoners of war, analogous to those which have been instituted for the help of the wounded. A certain Frenchman, in particular, Mr. Romberg, has concerned himself with this idea, which was accepted in principle by The Hague Conference; and Article 15 of the rules prescribes that every facility should be given to such societies to ameliorate the lot of prisoners. It must be admitted that the idea seems but little practicable. Societies created for this purpose alone, would have small chance of being instituted in time of peace; in time of war they would arouse a spirit of defiance. However, it is desirable that Article 15 should not remain a dead letter. The practical method would seem to consist in charging the societies for the help of the wounded with the assistance of prisoners. This would afford a new branch for their activity. Of course no part of their present resources could be devoted to prisoners, a special section would be created, having its own funds. Societies for aid to the wounded which have come into being in the various countries entertain cordial relations among themselves; they have periodical reunions, where they exchange very useful information, and they inspire confidence in their respective governments. They would seem, therefore, capable of offering all the desired guaranties, in the rôle of intermediary between belligerents, for the transmission of aid to prisoners.

“Voeux” have been expressed in this sense by several Red Cross congresses, of which the most recent was that of London in June, 1907. In France the “Société de Secours aux Blessés Militaires” has accepted the principle of such an institution.

Article 16 of the rules of The Hague stipulates that there shall be free postage and that facilities shall be granted for sending and transmitting aid of every kind. This applies both to letters, money, etc., sent to, or by, prisoners of war, and to the letters of the inquiry offices. The article further requires free customs entry and free transportation by government railroads for the presents and relief in kind for prisoners.

EXCHANGE—REPATRIATION.—Captivity ceases either by exchange or on the conclusion of peace. The rules of The Hague contain no provision relative to the *exchange of prisoners*. It has been concluded, with reason, that each belligerent should be free to determine this question according to its interests.

In other times, when wars were very long, frequent exchanges of prisoners were made. Usually, at the beginning of the war a convention was reached determining the conditions of these exchanges during the continuance of hostilities. This was done with much elaboration at the time of our civil war. Today it is very rare. The central power alone is qualified to decide and negotiate exchanges. In principle, however, were communications cut, or even difficult, a Commander in Chief might exercise this right.

The conclusion of peace also frees prisoners, who must then be repatriated as soon as possible. (Art. 20.) However, it is not stated that all prisoners must be repatriated in a short time, since certain of them may have been subjected to penalties.

At the conference of The Hague various delegates had asked that disciplinary punishments incur-

red by prisoners should not be considered, and that only crimes and offenses at civil law should be a ground for continuance in captivity after the conclusion of peace. The Germans opposed themselves to this proposition, remarking that its adoption would make extremely difficult the maintenance of discipline as the time for the conclusion of peace approached; that it would be better to leave the matter to the good will of the belligerents. This view may properly be accepted.



## SEVENTH LECTURE

---

**THE SICK AND WOUNDED.**—The situation of the sick and wounded relates to that of prisoners of war, because when in the hands of the enemy they are prisoners of a peculiar kind. If we consider the sick and wounded of each belligerent the question is one of domestic regulation. But the question becomes one of international regulation when we are concerned with caring for the sick and wounded of the enemy. This idea, although elementary and capital, has often failed of recognition; the sick and wounded are prisoners to whom special care should be given.

**HISTORICAL.**—For a long time the care of the enemy's wounded was a simple question of humanity; an international legal duty in regard to it did not exist. There were, to be sure, at times, in the centuries anterior to ours, agreements between army chiefs having for their purpose to protect the sick and wounded, the establishments which gave them shelter, and the personnel which cared for them. But these agreements, always temporary ones, and limited to certain particular cases, were optional. The need of a sanitary organization accepted by all powers was particularly felt during the wars of the Revolution and of the Empire. The convention of Geneva of 1864 accomplished this great advance by organizing a general obligatory system for all countries; it is in this that its originality consists. The result is a striking example of what may arise from private initiative. During the war in which France and Italy met Austria help was lacking for the care of the sick and wounded. A Swiss, Mr Dunant, who was following the military operations as a spectator, visited the battlefield of Solferino. The suffering which he wit-

nessed there led to his publishing a book called "Recollections of Solferino," which attracted great attention. He maintained, as a thesis, that the official health service could not possibly succor the wounded properly; that private charity should lend its assistance and prepare for that purpose in advance, during time of peace. This idea aroused the enthusiasm of a group of men of eminently practical ideas, who formed at Geneva, a modest society under the presidency of Mr. Moynier. In order to obtain results this Genevese society, in 1863, called a *private* international conference to which the governments were invited to send delegates. The situation was studied with care, and hopes, "vœux", were expressed that there should be in each country a single society, with a central committee, and further that certain guaranties should be given to such societies in order that they might, in full security, exercise their kindly purpose. The work of this conference has had a great influence, for everything which has since been done, has been done along the line of these ideas. But the question of the guaranties to be given to the societies was beyond the limits of private enterprise; it demanded international regulations and a diplomatic conference alone could make of this hope ("vœu") a reality.

It is to this meeting of 1863 that the Volunteer Red Cross Societies owe their origin. The later Conferences merely recognized them and legislated on their behalf. The American National Red Cross has been chartered by Congress and has by recent additional legislation been brought in touch with the Army.

The Swiss Federal Council having been asked to do so, accepted the mission of assembling a conference and succeeded therein, thanks to the particularly strong assistance of the Emperor Napoleon III.

THE GENEVA CONVENTION OF 1864.—In August, 1864, there convened at Geneva the international conference which formulated the celebrated "Convention of Geneva of August 22, 1864," which remained in force until the ratification of the convention of 1906.

The convention of 1864 first signed by France, is, today, accepted by almost all the States of the world. But if, at the start, it raised great enthusiasm, it also raised much suspicion. It lent itself, to be sure, to many criticisms. Hastily prepared, it did not allow for a certain number of considerations both legal and military; it offered, besides, a number of gaps. However, the number of its adherents only increased after each war. A battle is a terrible practical lesson, and the example of Königgrätz remains famous. Austria not having as yet adhered to the convention, the Austrian doctors, in the fear of being made prisoners by the Prussian army, abandoned their wounded, whose suffering was considerably increased by this interruption of care and the ultimate insufficiency of sanitary measures.

The criticisms directed against the convention of 1864 were justified; a revision was clearly necessary. In 1868 a diplomatic conference met for this purpose at Geneva. It prepared additional articles, of which the greater part had relation to maritime warfare. These articles, it may be said, were not ratified.

In 1874, at the time of the Brussels meeting, some interesting observations were made in regard to the care to be given to the sick and wounded, but the assembly confined itself to referring them to a later conference at which the convention of Geneva should be amended.

Finally in 1899, the First Peace Conference, after having expressed a hope ("vœu") for another meeting, prepared the convention of July 29, 1899, and

applied to marine warfare the principles of the Geneva Convention.

### **The Convention of July 6, 1906**

As a result of these moves the Swiss Federal Council decided to call a conference of revision. But first the South African war, then the Russo-Japanese war, retarded the conference, which was not able to meet until June, 1906. The work of this conference resulted in the Convention of July 6, 1906, destined to take place of the older one of 1864.

The delegates of thirty-five states were present, and each country had sent envoys having the qualification of representation required—soldiers, doctors, jurisconsults, and diplomats. The delegates showed very good will, and inspired themselves by the common interests to reconcile the military exigencies and those of humanity, and to avoid, in the stipulations, exaggerations which would render necessary their violation.

The convention of 1906 maintained as its essential basis the principles of the convention of 1864. More complete, better ordered, clearer, than the earlier one, it corrected its inconvenient features, filled up gaps, and caused obscurities to disappear; it systematically avoided the use of the words “neutrality” and “inviolability” which did not entirely fit the situation, but befogged the ideas and might, as a matter of fact, lead to absurd results.

CHAPTER I.—Chapter I is devoted to the sick and wounded. The fundamental principle admitted is the obligation which each belligerent takes upon himself, to care for the sick and wounded, regardless of the nationality to which they belong.

This duty, in other times a purely moral one, is thus today a legal obligation of an international nature. Its importance is very considerable in view

of the enormous number of effectives brought into contact by modern wars.

Experience shows that it will sometimes be difficult even for the conqueror to succor, with entire efficacy, all the wounded on a battlefield (example of Königgrätz), and therefore it has been determined that the vanquished nation shall have the right to leave, on the field, part of the necessary personnel and matériel to continue to care for the wounded which it has to abandon.

What is the legal position of the sick and wounded who have fallen into the enemy's power? In law, they are prisoners, in a particular status it is true, arising from the fact that they need care, but who, when they shall have been cured, will find themselves in the same position as ordinary prisoners of war. It was an error of the convention of 1864 not to recognize this fundamental idea. That convention required—and this was maintained in 1868—the return to their country, after being cured, of the sick and wounded who should be recognized as incapable of further service and of those who, even though capable of service, should engage themselves not to resume arms during the continuation of the war—an exaggerated idea of which it may be said, no application was ever made.

In 1906, this rule was emphatically set aside by proclaiming that the sick and wounded are prisoners, and that all the rules of international law concerning prisoners should be applicable to them. The convention, by the way, reserved a right of discretion to the chiefs of armies under which they are entirely free to stipulate for such agreements in favor of the wounded, as may be deemed by them convenient.

An innovation of 1906 has relation to the patrolling of the battlefield in order to prevent acts of theft and pillage. The party which occupies the field must

cause the wounded to be sought for and must take measures for their protection; this is a provision of which the practical importance cannot escape notice.

Moreover, the party occupying the battlefield must proceed to the interment of the dead after a careful examination of their bodies, and after having taken, or made a note of, all marks of identity found thereon. These marks of identity, which vary according to the country, are to be sent to the other belligerent with a list of the sick and wounded which have fallen into the victor's hands. The identification of the dead is a necessary measure required to reduce the anxiety in regard to those who have disappeared during the war as well as to obviate the civil consequences which result from uncertainty.

The Convention of 1864, actuated by a sentiment more humane than practical, guaranteed the liberty of such of the inhabitants *as gave succor to the wounded*; every wounded man taken care of was to serve as a safe-guard and the succoring inhabitants were to be exempt from the billeting of troops and from the payment of contributions of war. This undertaking (Art. 5), was impracticable, and as a matter of fact, was not put into effect. So, the conference of 1906 suppressed the old Art. 5; but still bearing the same idea in mind, specified that the military authorities shall always be at liberty to call upon the inhabitants to take care of the wounded and sick, in which case they may allow the inhabitants certain immunities.

### Sanitary Formations and Establishments

CHAPTER II.—THE DISTINCTION TO BE OBSERVED BETWEEN THE MOBILE FORMATIONS AND THE FIXED ESTABLISHMENTS.—In 1906 the expression “sanitary formations and establishments” was adopted to take

the place of that used in the convention of 1864 in which "all hospitals and ambulances" were spoken of. As a matter of fact, there has been no accord in regard to the definition of these two last classes of establishments.

Today it must be understood that the general expression "sanitary formations and establishments" includes at the same time the sick and wounded, the personnel and the matériel of such establishments or formations.

The word "formation" has reference to mobile formations, the composition of which varies according to the belligerent country; the expression is therefore applicable to ambulances, field hospitals, hospitals of evacuation, etc., all of which are susceptible of being mobilized. (In the U. S. Medical Service no distinction exists between the terms "Ambulances"—as used in the conventions—and "Field Hospitals.")

In regard to the fixed establishments, they include all the ordinary hospitals.

**THE RESPECT AND PROTECTION DUE TO SANITARY FORMATIONS AND ESTABLISHMENTS.**—The above distinction having been made, the general idea, clearly expressed in Article 6, is that the fixed formations and establishments must be respected and protected by the belligerent. The expressions "neutral" or "neutralized" which appeared in the convention of 1864, have been avoided, since, as we have already stated, they lead to misunderstanding, are not exact, and carry with them inadmissible sequences. It is sufficient to say that the formations and establishments shall be protected and respected (as was indicated also in Article 1 of the convention of 1864); *respected* means that they must not be fired upon; *protected* means that in case of the invasion or occupation of a territory by the enemy,

the latter must accord to them its protection. Such is the status to which the two expressions above cited have relation.

But it is proper to remark that the right to be respected and protected is subordinated to the obligation placed on sanitary formations and establishments of remaining within the sphere of action assigned to them, which consists in occupying themselves solely with sanitary duties. The protection ceases if they are used for the purpose of committing harmful acts against the enemy. It is thus, for example, that the admission of soldiers who are well, into a hospital with a view to facilitating their escape later, constitutes an act of perfidy. However, the extent of this restriction must not be exaggerated, and care was taken to indicate this clearly in Article 8.

In preparing this article, account was taken from the start of the fact that in the various armies the same methods are not followed to insure protection to the sanitary service; thus, the German hospital corps men are armed, whereas those of many other countries are not. However, it may be useful, at a given time, to take precautions against marauders and pillagers and to provide for this purpose a picket to guard and to insure respect for hospitals. The second paragraph of Article 2 of the convention of 1864, however, laid down that "Neutrality should cease if the ambulances and hospitals are guarded by a military force." As a result, the question discussed was that of determining what would be the situation of the picket guard in case the enemy should arrive? One may ask if this picket could or could not be made prisoners? In accordance with the above cited text of 1864, there might be a doubt on this point which has, however, been removed in a very sensible way by Articles 8 and 9 of the convention of 1906. It was therein decided that the members of the picket should



not be treated as prisoners of war, because they fulfil an important mission from which both belligerents may profit; besides, the presence of the picket is particularly necessary in the interval of time which separates the departure of the belligerent to whom it belongs and the arrival of the adversary. The case was presented quite clearly at Mukden, where acts of pillage were to be feared if the sanitary establishments had not been sufficiently protected in the interval between the evacuation by the Russians and the occupation by the Japanese. Under these conditions, whether the hospital corps men be armed or not, soldiers who protect the hospitals should be treated as they are—that is, not made prisoners of war.

Secondly, the attention of the delegates to the Geneva conference of 1906 was called to the following fact, which, it seems, had occurred: There was found in a field hospital, arms and ammunition taken from the wounded or sick, which for lack of time had not yet been conveyed to the army depot, with the result that the right was assumed to refuse protection to the hospital. In order to remove this anomaly, the third paragraph of Article 8 of the convention of 1906 provides that the fact "That arms or cartridges, taken from the wounded and not yet turned over to proper authorities, are found in the formation or establishment," shall not serve to deprive the formation of the protection granted to it by Article 6.

### **Of the Personnel**

CHAPTER III.—DEFINITION OF THE OFFICIAL PERSONNEL WHICH MAY NOT BE MADE PRISONERS OF WAR.—In that which regards the personnel, a very general formula was adopted which is adaptable

to the organization of the various armies. The text of Article 2 of the convention of 1864 had clearly become inapplicable to France, for instance, since it used the term "Intendance," a corps which today is no longer charged with the health service in that country, whereas in some other countries the "Intendance" includes such service. The United States has nothing in its military system which corresponds to the "Intendance" unless it be the new Q. M. organization, nor so far as we know has England such a military branch. It is for this reason that the first paragraph of Article 9 was framed as follows:

"The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war."

Under this wording mention is made of the personnel *exclusively* charged with the treatment of the sick and wounded, because there is in existence another personnel which is officially attached to the service of transporting the wounded, but which plays the rôle of both litter bearer and combatant. For the reason already stated the use of the expression "neutral", applied to the personnel by the convention of 1864, has been avoided.

We have seen above the signification to be given to the words "respected" and "protected". (They must not be fired upon, etc.). The provision to which the greatest importance is attached is that which forbids the making of the personnel prisoners, and which thus prevents a return of the deplorable abandonment of the wounded on the battlefield, such as was seen at Königgrätz.

However, the personnel of sanitary formations may be held for a greater or lesser time by the enemy into whose hands they have fallen; we will later discuss the reasons for this measure.

THE ASSIMILATION OF THE PERSONNEL OF VOLUNTEER AID SOCIETIES TO THE OFFICIAL PERSONNEL.—In article 9, which we have just examined, there is only question of the official personnel belonging to the medical service of the army. It has been necessary also to take into account the personnel of the volunteer aid societies, with all the more justice since the Geneva convention was due to the initiative of these private societies; nevertheless in 1864 the most complete silence in respect to them was observed. In regard to this, it is proper to remark that the French government of that time, although particularly favoring the adoption of the projected convention, had given a formal order to its delegates not to sign it if it contained any mention of aid societies. Such was the feeling in 1864. This can be understood because the aid societies were still in an embryonic state and it was impossible to form a precise idea of their method of organization or work. Some thought that these societies should have an autonomous existence with no intervention on the part of the government; others considered this idea inadmissible in view of the fact that aid societies can do useful work only under the superior direction of the government on which they depend.

However this may be, what was to be concluded from the silence of the convention of 1864? The aid societies were very much concerned in regard to it, to an extent which led some of them to think that they had no right to the benefits of the convention. We consider that this idea was erroneous, because the aid societies attached to their government and working under its control are in a measure part of

its official personnel; and as a result they must be allowed to participate in the benefits of the protection and enjoy the immunity required by the convention. The question does not seem to admit of doubt to us, but it resulted from the silence of the convention of 1864, that aid societies could not undertake to create for themselves an independent status, since their right to inviolability, depended on their coming, after a fashion, into the cadres of the army (and it is still so).

THE ORGANIZATION OF AID SOCIETIES IS A QUESTION OF DOMESTIC ARRANGEMENT.—Every country is free to accept or not the help of private charity; if it accepts it the government must give the personnel a regular authorization and charge it with some mission. Generally speaking, aid societies are excluded from service at the front. This rule is laid down for instance by the French government. It was desired to so hold expressly in the Geneva Convention of 1906, but the point was set aside, and properly so, it being clear that a belligerent may need aid societies, even on the battlefield. There are some persons who have particular ideas in regard to the rôle of aid societies. Thus what we may call the senior French society, the “*Société de Secours aux Blessés*” has for its avowed purpose to render aid on the battlefield and this notwithstanding the military regulations of the French government. The American National Red Cross, as its charter shows, has in view four purposes: First, to furnish volunteer aid to the sick and wounded of armies in time of war; second, “to perform all the duties devolved upon a national society by each nation which has acceded” to the Geneva treaty; third, to act in matters of voluntary relief and in accord with the military and naval authorities as a medium of communication between the people of the United States and their army

and navy; and fourth, to continue and carry on a system of national and international relief in time of peace. What is meant by the second purpose is not clear since the only mention of volunteer aid societies in the treaty of 1864 or rather in the addition thereto, has connection with hospital ships. (The American Red Cross was incorporated prior to 1906.) We must presume that what is meant, is that it shall perform such duties as are imposed upon it by the United States. So far our government has imposed no duties upon the American Red Cross except such as have been accepted by that corporation in its charter.

To sum up, the organization of these societies is a question of national and not of international regulation.

CONDITIONS FOR THE COOPERATION OF AID SOCIETIES IN THE SANITARY SERVICE OF ARMIES.—This being set forth, let us see what the first paragraph of Art. 10 of the convention of 1906 says:

“The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.”

From what has been said it follows that each government is left free to arrange for the cooperation of the personnel of aid societies specially authorized by such government. But this personnel must be subject to military laws and regulations. This last requirement seems indispensable because there is a close correlation between the duties and the rights of the personnel in question; a personnel having rights, without being held to certain duties, might be dangerous even to the government which employs it. In 1870 abuses were observed, and if things were other-

wise individuals might practice espionage or escape from active military service.

So far as concerns the United States we have the Act of April 24, 1912, published to the Army in G. O. 16, W. D. 1912, wherein it is provided that in time of war, or when war is imminent, and the President deems it necessary, he is authorized to accept the services of the Red Cross "under the sanitary services of the Army and Navy in conformity with such rules and regulations as he may prescribe." The act further provides for the transportation and subsistence of the personnel of the Red Cross under certain conditions "as civilian employees employed with the said forces" and that Red Cross supplies may be accepted by the government as a gift. Beyond its national charter and the Act just mentioned, the American National Red Cross has no official recognition in this country.

THE PRINCIPLE OF THE ORGANIZATION OF A SINGLE AID SOCIETY FOR EACH COUNTRY.—In most countries the advice given by the Geneva conference of 1863 has been followed. That is to say, there is in each country but one aid society with a central committee having authority to represent the whole of the society either in relations with its own government or in relations with foreign gatherings.

### **The Role of the International Committee of Geneva**

We have pointed out the rôle played by the international committee which was formed at Geneva to urge the adoption of the convention of 1864. This committee has continued to exist and still has the same president as at the beginning, Mr. Gustave Moynier, whose work cannot be too highly praised. Although international, the committee recruits itself from the Genevese and finds itself, in a measure, in

touch with the convention of 1864 as well as with the revised convention of 1906. Its unofficial position leaves to the committee much greater independence and initiative, and permitted it to render great services when the question was presented of extending the rules of the convention to maritime war, of causing them to be revised in 1906, and of applying them in certain cases where the committee was chosen as an intermediary by belligerents themselves. The committee, serves, besides, as a link between the various national aid societies. It publishes an international bulletin containing all the information of use to these societies in regard to things done, projects, etc. In addition, for about twenty years it has been organizing periodical conferences of Red Cross Societies. These conferences meet, sometimes in one country, sometimes in another. They have been held: In Rome (1892), in Vienna (1897), in St. Petersburg (1902), in London (1907), and in Washington, D. C. (1912).

It is well to remark that the international committee at Geneva is not an aid society; that it is distinct from the aid society existing in Switzerland, and that, therefore, it is not attached in any way to the Swiss Federal government or to any other government.

POSITION OF THE VOLUNTEER AID SOCIETIES.—The idea of those who may be said to have originated the Red Cross movement was that whatever the branches might be, the Red Cross volunteers of a given country should be united to the extent that they should be represented by a single body or committee, which would be in close touch with the government and be responsible in time of peace for the international undertakings of the Red Cross. We are not concerned in these lectures with the working of the aid societies, from a domestic and charitable

point of view. But from an international point of view it would seem almost a necessity that each government shall have to do with but one organization. If we imagine dozens of charitable societies all having the same general aims, clamoring in time of war for the recognition which we will see later, is a prerequisite to their being allowed to succor the sick and wounded of the army, it will be obvious that confusion must result. By the Act of June 23, 1910, amending the charter of the American National Red Cross, Congress would appear to have recognized that institution as the one organization with which the government will deal. The act, however, is not entirely clear as it does not forbid to all persons not members, the use of the Red Cross emblem, except in certain cases. Recognition is further given in the the Act of March 3, 1911, wherein the Secretary of War is authorized to detail an officer of the Medical Corps to take charge of the first aid department of the American Red Cross.

Whatever legislation there may be in regard to the use of the Red Cross emblem, applies we must remember, only to the emblem within the jurisdiction of the state which legislates and does not serve as authority for a Red Cross volunteer society to use the emblem internationally. It may, however, serve as the preliminary step, that of recognition by the home government. We have considered the requirements demanded, if a volunteer aid society is to be allowed to assist the medical department in an international conflict. It must be duly recognized and authorized by its own government, be employed in the sanitary formations and establishments of armies and be subject to military laws and regulations.

We will now consider the question of the aid societies of neutrals rendering service to wounded and sick belligerents.



CONDITIONS UNDER WHICH NEUTRAL AID SOCIETIES MAY LEND THEIR ASSISTANCE TO A BELLIGERENT.—It has happened, during the last twenty-five years, that aid societies of neutral countries have been disposed to go to the aid of a belligerent; as a result it has been necessary, in order to avoid misunderstandings, to indicate the conditions under which such societies may work. *A priori*, this measure would seem a trifle naive, but it is, nevertheless, indispensable. There have been occasions when a society which has been specially organized for the emergency, or an existing society, has arrogated the right to send a field hospital into a belligerent country, without knowing whether it would be agreeable to the latter. For example: On the occasion of the Greco-Turkish war, in 1897, a French field-hospital was ready to start and the president of the aid society was only giving thought to the determination of the question of the flag to be raised. Notified indirectly of the contemplated departure, the French minister of foreign affairs took the wise action of telegraphing to his agent at Athens in order to forwarn the Greek government. The answer arrived, the evening before the date which had been fixed upon by the organizers for the departure. It was, for them a disillusionment. The Greeks declined the offer of the personnel, but declared that they would accept with thanks gifts of money or matériel.

As a rule, belligerents do not care to receive foreign field hospitals. Another example presents itself. During the Russo-Japanese war the French "Société de Secours aux Blessés" had prepared two large field hospitals to go to the assistance of the Russians. But the latter preferred that they should not start, accepting only financial aid (250,000 frs.)

which served for the equipment of a hospital ship ("L'Orel").

In short, taking into account what we have said, Article 2 of the Geneva Convention of 1906 explains that:

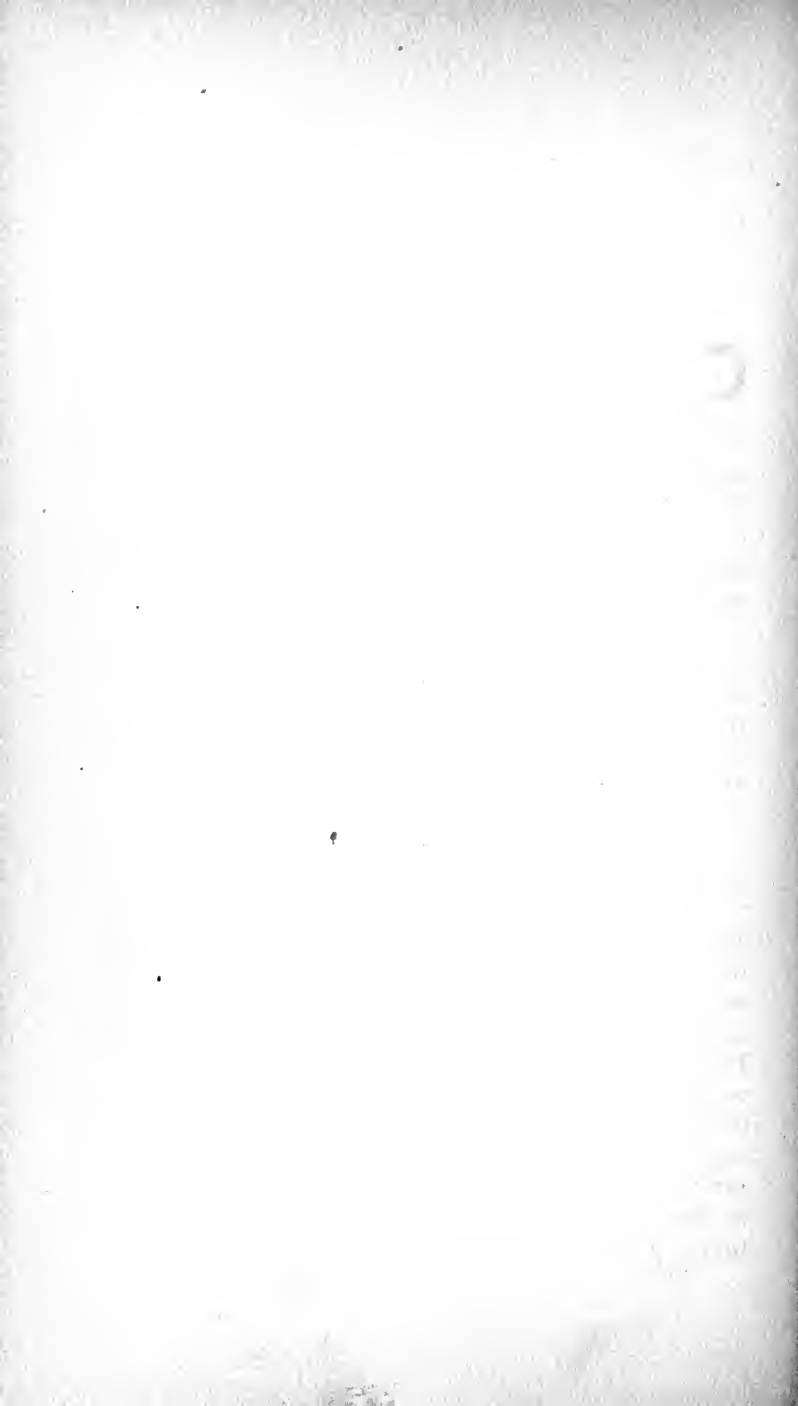
"A recognized society of a neutral state can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof."

**CASE WHERE THE SANITARY PERSONNEL FALLS INTO THE POWER OF THE ENEMY.**—The position of the official personnel, or that which is assimilated to it, is laid down in Article 12. We have seen that they are not to be made prisoners of war; but they may fall into the hands of the enemy. This case is likely to present itself frequently on the battlefield, and Article 1 prescribes that the belligerent who is obliged to abandon his sick and wounded to his adversary shall leave with them as much of his personnel and matériel as military circumstances will permit, to aid in caring for them. The question which presents itself, is to know for how long a time this field hospital personnel is to remain in the power of the enemy. It is clearly impossible to fix a determined period. A field hospital may be held for the time necessary for the enemy itself to be, in a measure, in a position to assure care to the wounded by means of its own resources in personnel and matériel. On the other hand, it is possible that there will be military objections to allowing to depart a field hospital, the personnel of which may have acquired involuntarily or otherwise, military information of its enemy. The enemy may be brought to the necessity, therefore, of imposing an itinerary

which will avoid the direct return of the field hospital to its proper station. It may result that certain abuses will occur. These were numerous in 1870. The roundabout routes ordered for the returning field hospitals did not always seem justifiable, but the reasons which cause an enemy to act are not always easy to understand. The settled principle, and one which leaves no doubt, is that the belligerent has the right to fix the time of the return of the field hospital as well as the itinerary which it must follow. Here is the text of Article 12 of the convention of 1906:

“Persons described in Articles 9, 10, and 11, will continue in the exercise of their functions under the direction of the enemy, after they have fallen into his power.

“When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms and horses as are their private property.”



## EIGHTH LECTURE

---

### Pay of the Official Personnel

THE question of the pay of the personnel has also been considered. Here clearly, a difference must be made between the official personnel attached to the military service and that of the aid societies; pay has no relation to the latter personnel. Everyone was of the opinion that pay was due to the first mentioned, but there was grave doubt as to what the pay should be. Two systems could be suggested (even three):

(a) The personnel would have a right to the pay which it receives in its own army, its situation not having changed. To this objection was made, on the ground that it might seem hard for the enemy to be obliged to give to the sanitary personnel fallen into its power a higher pay than that which was received by its own army.

(b) The second idea put forth, consists in considering, after a fashion, the personnel as a part, temporarily, of the enemy army, and to pay it at the same rate and under the same rules as are in force for that army. This idea won out, although attention was called to the fact that in certain cases this method of payment might be unfavorable to those interested. For example, a European or an American personnel would hardly be satisfied under the system of the Chinese army, which restricts its payments to a simple bowlful of rice. However this may be, it is rather curious to observe that the attempted solution in Art. 13 of the convention of 1906, is in opposition to that which had been adopted, in 1899, at The Hague,

for the adaptation to maritime war of the principles of the convention of Geneva of August 22, 1864 (Art. 7: full enjoyment of their salaries). In 1907, however, at the Second Peace Conference, the two texts, covering both war on land and war at sea, were brought into accord (the same allowances and pay as those received by persons of the same grade in the army or navy of the enemy belligerent, according to the case).

(c) The third system would consist in not paying the personnel at all and leaving it to its country to give it its back pay on its return.

### Of the Matériel

CHAPTER IV.—RESPECT DUE TO THE MATÉRIEL OF MOBILE SANITARY FORMATIONS.—This chapter sets forth the essential difference between the fixed establishments and the mobile sanitary formations. The matériel of the latter is respected; it was thought it would be impossible for a field hospital to work if its matériel was taken away from it. This decision is in derogation of the ordinary principles of international law, since it establishes a rule that the matériel of field hospitals is not a good prize. Let us read Art. 14 of the convention of 1906.

“If mobile sanitary formations fall into the power of the enemy, they shall retain their matériel, including the teams, whatever may be the means of transportation and the conducting personnel. Competent military authority, however, shall have the right to employ it in caring for the sick and wounded. The restitution of the matériel shall take place in accordance with the conditions prescribed for the sanitary personnel, and as far as possible, at the same time.”

THE MATÉRIEL OF FIXED ESTABLISHMENTS IS SUBJECT TO THE ORDINARY RULES OF WAR.—Where

fixed establishments are concerned (military hospitals, or depots of medical matériel), the ordinary law of war applies and the matériel is considered as being good prize or booty.

Art. 15 in regard to this reads as follows:

“Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but cannot be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of important military necessity, if, before such use, the sick and wounded who are in them have been provided for.”

A comparison of Articles 14 and 15, above quoted, shows the great necessity which exists for distinguishing field hospitals from fixed hospitals. We may cite, in regard to this, an instructive anecdote which relates to the siege of Metz. During the two days which preceded the capitulation, the field hospitals were withdrawn into the place, and the greater part of their matériel was distributed among the fixed hospitals. It is clear that in order to prevent the matériel from falling into the enemy's hands, the contrary should have been done. It has never been known whether this action was due to bad faith or to ignorance, but in either case it was an extraordinary performance.

**RESPECT FOR THE MATÉRIEL OF CIVIL HOSPITALS.**—Civil hospitals, whether diverted or not to the needs of the army, enjoy the benefit of Article 56 of The Hague regulations regarding the laws and customs of war on land; they are therefore to be respected.

**RESPECT DUE TO THE MATÉRIEL OF THE FIXED ESTABLISHMENTS OF AID SOCIETIES.**—It has been more difficult to determine the question of matériel of aid societies found in fixed establishments (in regard

to field hospitals, see Article 14). A controversy was started on the point of whether this matériel, of considerable importance, should be respected. Some held that such property is a good prize, for otherwise it would be easy for a government to cause its own matériel to escape the laws of war by placing it under the cover of aid societies. The partisans of the opposite opinion (inclining towards the recognition of the respect due the matériel of aid societies) showed that aid societies had a difficult existence, and that moreover, the aid granted represented an effort of private charity which should not be discouraged. They added, to strengthen their argument, that it would be a step backward to admit that the matériel of aid societies might be captured. As illustrative of this the surgeons who took part in the Russo-Japanese war narrated to the conference the following incident: At Mukden there were established four or five hospitals, of which only one was a military hospital, the others belonging to the Russian Red Cross (which disposes of enormous resources, from taxes and appeals to private charity in all its forms). On their arrival the Japanese allowed the matériel of the four Red Cross hospitals to be carried off, it being claimed as private property.

The Japanese must have later regretted this generosity, since they voted in the conference of 1906 against the principle of respect for such property, the principle was, however, adopted by a large majority, though it was necessary to urge the point strongly.

Finally it was objected that the enemy arriving in a town might have immediate need of the sanitary matériel, and the question was presented of whether it could touch the valuable stores of aid societies. In order to disarm opposition, attention was called



to the fact that so long as it was private property this matériel was subject to the right of requisition.

Here is the text of Article 16:

“The matériel of aid societies admitted to the benefits of this convention, in conformity to the conditions therein established, is regarded as private property and, as such, will be respected under all circumstances, save that it is subject to the recognized right of requisition by belligerents in conformity to the laws and usages of war.”

To close this chapter, it is well to call attention to the fact that the right of requisition will not be exercised as freely in the future as it has been exercised in the past, because of an amendment to the old rules, contained in Article 52 of the rules of The Hague of 1907, which provides for the ultimate payment for property taken.

### Of Convoys of Evacuation

CHAPTER V.—POSITION OF THE PERSONNEL AND MATÉRIEL OF CONVOYS OF EVACUATION.—This chapter puts into effect, in regard to convoys of evacuation, the preceding agreements (treatment of sick and wounded, situation of the personnel, and the disposition to be made of the matériel). There is clearly a case here for the application of the rules established under those regulations. If an enemy meets a convoy of evacuation of the adverse belligerent he may make prisoners of war of the sick and wounded. This is his general right; but most frequently he has no interest in so doing except in the case where the convoy includes an officer whose capture would appear important. Next, the enemy must respect and protect the convoy; he may, however, disintegrate it, if he thinks it necessary, on

condition that he charge himself with the duty of caring for the sick and wounded. Finally, he must respect the personnel and matériel by observing the rules contained in Chapters 3 and 4.

### Of the Distinctive Emblem

CHAPTER VI.—HERALDIC EMBLEM OF THE RED CROSS.—We have arrived at the distinctive emblem of the sanitary service of armies; this is the Red Cross, which in no wise presents the character of a religious emblem. This point was insisted upon in 1906; the Christian Cross has generally unequal arms, whereas the Red Cross is composed of five equal squares (although mention of this was avoided), and constitutes a reversal of the Swiss colors. It was desired to do honor to Switzerland and to take the emblem of a neutral and respected country, which is entirely proper. In order to accentuate its meaning, Article 18 of the convention of 1906 is worded as follows:

“Out of respect to Switzerland, the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal colors, is continued as an emblem and distinctive sign of the sanitary service of armies.”

At the outset of the Geneva convention of 1864 no criticism was made in regard to the adoption of this emblem. Turkey itself gave its adhesion in 1865. The difficulties began in 1876; during the war with Servia, Turkey pretended that the Red Cross was a religious emblem detested by its troops, who were not disposed to respect the emblem and it substituted, of its own motion, a crescent for the cross. There was here a flagrant violation of the Geneva Convention; besides, the crescent has an aggressive character much more strongly accentuated than has the cross. At the time of the Russo-Turkish war consid-

eration was given to this situation, and through the intermediation of Germany an extraordinary *modus vivendi* was agreed upon. Turkey assumed the obligation to respect the Red Cross, on the Russian field hospitals, but was authorized to raise over its own a crescent. The whole thing was most peculiar, because how can we understand that Turkey, which declared that it could not obtain respect for the Red Cross when it appeared over its own field hospitals, could reach a better result in regard to the field hospitals, of its enemy.

This same *modus vivendi* was tolerated during the Greco-Turkish war, but the field hospitals were a little better respected.

In 1899, at The Hague Conference, when the application of the Geneva Convention to maritime war was under consideration, an Ottoman delegate asked that Turkey might use the crescent, but this petition was set aside on a motion that it was out of order since the question was to extend the convention and not to modify it, but that in case of a revision, Turkey might make such propositions as appeared to it proper. In 1906, the time for the revision arrived, but the Turks abstained from coming to the conference, with the result that during the discussion of the various articles there was no question of modifying (for certain powers) the distinctive emblem; and yet there were at the conference non-christian states such as Japan, China, Persia and Siam. But on the very day on which the convention was to be signed, a rumor spread that Persia did not wish to sign except under a reservation in regard to Article 18. What was to be done? In order to avoid embarrassment the signature was admitted with a reservation; as a result Persia (and also Siam) may have an emblem other than the Red Cross.

We have now reached The Hague in 1907, where the question was on the adaptation of the Geneva convention to maritime war. This time the Turks bring forward their project of modification. Clearly, it was a little late. Acting upon the advice given him, the Turkish delegate did not make a formal proposition, but contented himself with reading his motion, of which the conference took note. Due to this fact, the Geneva Convention of 1906 is not modified but it must be admitted that there is a moral engagement by the governments to respect the crescent on the Turkish field hospitals, since Turkey engages itself to respect the Red Cross. Certain of the delegates seemed to regret that the question was not definitely settled by the general substitution of a red star, for example, in place of the red cross, criticised by certain recalcitrants. This regret was somewhat tardy.

PRECAUTIONS TO BE TAKEN AGAINST ABUSES.  
—In order that the wearing or display of the distinctive emblem shall not lead to abuses, various precautions have had to be taken. For the personnel, the brassard must be delivered and stamped by a proper military authority. In order to dispel doubts trouble has been taken to specify that this brassard is to be worn on the left arm and that it must be *fixed*. As regards the flag, it can only be raised over sanitary formations and establishments which military authority orders to be respected, and with the consent of such authority. This disposition is of a nature to prevent the return of earlier abuses. Thus, at Dijon, in 1870, a large number of inhabitants had decorated their windows with white flags bearing red crosses, hoping to be excused from lodging German troops. Aside from the absurdity of such a performance, a result may be produced contrary to that which is expected. It is for this reason that military authority

(in most cases) wisely decides that a private house is to be considered as a hospital only if it shelters a proper number of sick (six), which also facilitates control and surveillance.

### **Question of the National Flag**

The question of the flag presented itself at the conference of 1906 under conditions which were particularly interesting. According to the convention of 1864 the Red Cross flag was under all circumstances to be accompanied by the national flag. Since then, two hypotheses have required consideration. In the first place what flag should a neutral field hospital raise when going to place itself at the service of a belligerent? Is it the flag of the neutral country or that of the belligerent? This point was in controversy. It is logical that it should be the flag of the belligerent who is responsible for the hospital in the eyes of the adversary and who protects it. Article 22 of the convention of 1906 determines the question in that sense. But there was to be regulated a question infinitely more delicate. What flag should be raised by a hospital which falls into the power of the enemy and which remains there for a certain length of time? Shall it retain its proper flag, or shall it raise the flag of the enemy in whose power it finds itself? A lively discussion arose on this point. The opinion then upheld by Professor Renault was that the hospital should retain its own flag, since it is only provisionally in the power of the enemy; that it is necessary that all confusion should be avoided; and it must also be said that for the sentimental reasons it is painful to be sheltered by the enemy's flag. The other side endeavored to prove that the field hospital became, for the time, part of the enemy's forces, the latter in addition, being bound to pay its personnel; and it was added that, under the cover of

the enemy's flag, the hospital might perhaps be better protected than under its own flag. This second opinion had gathered but a small number of adherents, when the German delegate (General v. Manteuffel) thought of reaching an agreement on another ground, by purely and simply suppressing the flag of nationality. This solution was fortunate, since it implied the triumph of neither of the two contending opinions. Therefore, when field hospitals have fallen provisionally into the enemy's power, they raise no flag, other than that of the Red Cross (Art. 21—2d paragraph.)

CHAPTER VII.—OF THE APPLICATION AND EXECUTION OF THE CONVENTION—AND CHAPTER VIII.—OF THE REPRESSION OF ABUSES AND INFRACTIONS.—It was thought well to take measures to endeavor to prevent the frequent abuse, both in time of war and of peace, of the insignia and name of the Red Cross, particularly, as a trade mark and for commercial purposes generally, (signs of apothecaries, of dealers in various products, perfumeries, etc.) Some countries have already caused repressive laws to be enacted, others have undertaken to follow the same line which clearly requires practically unanimous consent. A project of law is being prepared in France, and England has also recently decided to legislate in this matter. (See for action of U. S., National Red Cross legislation.)

Along the same lines Art. 28 indicates the measures to be taken with a view to war, so that each belligerent may be prepared to severely punish individual acts of pillage and of bad treatment of the sick and wounded, as well as the usurpation of military insignia, and the wrongful use of the flag and brassard of the Red Cross.

Article 26 says that: "The signatory governments shall take the necessary steps to acquaint their

troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large."

This requirement is all the more rational since the role of the personnel which is protected (doctors and hospital corps men) is a particularly delicate one, especially when they fall into the enemy's power, and when they come into the possession of secrets of which they should not make use. It is necessary, therefore, to give them a strong moral training, capable of confining them to their exclusively medical duties under pain of perfidy on their part.

Finally, it is indispensable to impress upon soldiers that they are not to fire on hospitals or on doctors, but they must, on the contrary, respect and protect them.

### **Non-Hostile Relations of Belligerents— Flags of Truce.**

Notwithstanding hostilities which are evidenced by an exchange of projectiles, belligerents may have personal relations taking a peaceful form. The regulation of certain questions, such as the exchange of prisoners, the conditions of a capitulation, the signing of an armistice, etc., clearly requires preliminary communication, in accordance with the provisions more or less strictly defined, contained in the military regulations of each country.

The method of these communications is by *parlementaires*, \* who have the rights and duties

---

\* A "*parlementaire*" as described by Art. 32 of The Hague Rules is an individual who is authorized by one of the belligerents to confer with the other and who presents himself to the enemy with a white flag. In the English language no equivalent word for "*parlementaire*" exists and I have therefore adopted the French term. I would suggest that we should adopt the word for use in our military vocabulary, as I understand the British army has done, since the term "*parlementaire*" describes the agent in question without the necessity of a descriptive phrase. The "bearer of a flag of truce" is usually an enlisted man who accompanies the officer charged with the negotiations.

indicated in Arts. 32, 33 and 34 of The Hague rules of 1907 with regard to the laws and customs of war on land. *Parlementaires* may be either officers or civilians. It was thus that in 1870 the city of Dijon, being placed under the obligation to surrender, charged members of the municipal government with the mission of negotiating, in the middle of night, with German headquarters. The role of *parlementaires* may vary according to the case; some are simply messengers transmitting correspondence from one side to the other; whereas others have the important function of negotiating military conventions, particularly a suspension of arms, a capitulation, etc. (In this last case a general officer is designated or a field officer of high rank).

Whatever be the case, *parlementaires* must cause themselves to be recognized by presenting themselves with a white flag, and being accompanied by a trumpeter, bugler, or drummer, by a flag bearer, and, when necessary, by an interpreter. All this personnel has the right to inviolability.

That a *parlementaire* must be accompanied by a trumpeter or drummer seems to be almost a requirement of international law, and therefore except where it is impossible, this form should be complied with. The Hague rules would appear to contemplate that a party advancing under a flag of truce should not consist of over four persons, viz.: the *parlementaire*, the flag bearer, a trumpeter and an interpreter. The general understanding however is that the size of the party may reasonably be in excess of this number. Thus the German regulations provide for horse holders. When an officer of high rank is sent forward it would seem proper that he should be attended by an orderly and perhaps even by a staff officer. However this may be, it is essential, if trouble is to be avoided,



that the universally recognized forms should be observed, and if the party be larger than is indicated in the Hague rules, care should be taken to have the parlementaire, the flag bearer and the trumpeter well in the lead in order that the enemy may readily understand the nature of the advancing party. There have always been too many misunderstandings and controversies in regard to flags of truce and this condition can only be minimized by a rigid observance of all the formalities and a close adherence to the punctilios.

But it must not be understood, if a parlementaire plays a role analogous to that of a diplomatic agent, that he receives the benefit of the absolute immunity universally recognized as due to the latter. The person of a diplomatic agent is inviolable even when he has committed a crime, the the only precaution then taken in regard to him being to reconduct him to the frontier; this condition does not apply to a parlementaire. The chief to whom a parlementaire is sent is not obliged to receive him under all circumstances. In principle a parlementaire who is not recognized at the advance posts of the enemy, is reconducted to the advance posts of his own army; but if notice has been given in advance, that no flag of truce will be received he may be fired upon if notwithstanding this notice, he presents himself. It is, in principle, allowed to each army to take measures to prevent parlementaires from profiting by their mission, by enlightening themselves or by spreading suggestive news, etc. Often an extraordinary carelessness is shown in regard to this. A typical example is the following: a German lieutenant colonel who had been sent to Laon, being allowed to wander about, went to the Hotel de Ville, where the municipal council was gathered, and addressed the meeting in order to lead the city govern-

ment to intervene with the military governor with a view to the surrender of the place. Clearly this case seems to go beyond all belief and we may suppose that it is unique of its kind. But without committing a fault a parlementaire may discover a secret of the enemy (a projected movement of troops, etc.); in such case he may be temporarily held. If, beyond this, he takes advantage of his privileged position to provoke or commit an act of treachery the parlementaire may be punished. In the consideration of such a case, the greatest care must be used; positive and irrefutable proof is needed. Fortunately the case is a very rare one. To prevent it by measures of precaution is much to be preferred. When it occurs the opposite party must be notified without delay of the reason for the retention of the culpable parlementaire, who *cannot* however, be convicted without a trial.

The accomplishment of their mission by parlementaires leads us to speak of military conventions.

### **Conventions Which May Arise Between Belligerents**

We are here concerned with the war conventions which arise during the course of operations between belligerents. Not all of these are exclusively military. We find an example of this in an armistice.

All conventions between belligerents are certainly, in a certain sense, international conventions, since they are concluded by representatives of different nations; but the ordinary rules of diplomatic conventions are not applied to conventions which are exclusively military. The former may only be concluded by agents who have received from their governments a special mandate which is called *full powers*; besides, due to the rules of ordinary law, an international convention, properly speaking, is not

concluded from the fact of the signatures of the plenipotentiaries, it does not yet bind the governments concerned; it must be ratified by the head of the state and even, sometimes, in certain countries, it must receive the approval of parliament.

It is practically thus with the United States. International conventions are neither more nor less than treaties. Wilson defines a treaty to be "an agreement between two or more states in conformity to law" and further that "A convention usually relates to some specific subject rather than to matters of general character, as in the case of a treaty." While in describing an international agreement the technical difference mentioned may lead to the agreement being given a specific name, the fact remains that the agreement to be binding must ultimately be a treaty such as our constitution provides for. It is customary where a number of nations meet, as they did at Geneva and at The Hague, to consider and agree upon, if they can, a system of rules to be applied to certain international conditions, to call the result reached a convention. The legal ratification of this convention by two or more of the nations gives to it the full force of a treaty, as between the ratifying powers. In the United States the treaty making power is in the President by and with the consent of the Senate (it being required that two-thirds of the Senators present concur.) The procedure is as follows: The President having negotiated a treaty, submits it to the Senate. If two-thirds of the Senators present fail to vote in favor of the treaty, it fails; if on the other hand, the Senate concurs and so informs the President, the latter ratifies the treaty, that is, formally concludes it with the other nation. Then or at sometime afterwards, the President proclaims it. The Supreme Court has held that after ratification, a treaty "is considered as con-

cluded and binding from the date of signature," as between the governments, while as regards persons, it is binding only from the date of ratification and proclamation. There are many cases, with us, where the ratification is not immediately followed by a proclamation, in such cases, therefore, persons are only bound from the date of the latter. This must clearly be so since until the proclamation of the President has made known the treaty to the public, the latter can have no official knowledge of its contents or of the fact of its ratification. In conventions such as those of Geneva or of The Hague, in which many nations join, the method of ratification is to deposit with some agent, as with the government of the Netherlands, the instrument of ratification and thus by one act enter into treaties with all the other governments concerned.

These requirements would be incompatible with the nature of military conventions; the latter are negotiated and concluded under the empire of necessity by the military chiefs, without special powers, and without the requirement that there shall be a later ratification by the belligerent states. Such conventions are valid on condition of being distinctly military and of containing no political clauses. The military chiefs must give appreciation to the particular circumstances in which they find themselves; they must confine themselves to the instructions which they have received and to the regulations of their own countries. The failure to observe these instructions or regulations may lead to grave responsibilities and to disciplinary penalties for the military chiefs, but still in no wise touch the validity of the convention.

Military conventions are of a very varied nature. The Hague considered the two most important: *capitulation* and *armistice*.

Purely voluntary conventions were not mentioned (such would be a convention relating to the exchange of prisoners); capitulation and armistice depend, to be sure, upon the parties, but more often they are dictated by the circumstances of the case.

Certain transactions having in view the furnishing of guaranties, such as safe-conducts and safeguards, have been considered to be of the nature of conventions, but there is no analogy; these acts are unilateral, and The Hague does not mention them.

**SAFE-CONDUCTS.**—Safe-conducts are not restricted to war times; they may be granted in time of peace. Let us suppose that a man who has failed in business has taken refuge abroad. He is needed in order to obtain certain information in regard to his failure. A safe-conduct may be granted to him guaranteeing that he will not be arrested while he is testifying.

In time of war a safe-conduct is a simple passport—a permit to cross the enemy's lines without being molested; it may be added, perhaps, that the safe-conduct is a little more than a passport, since it covers not only the person of the bearer, but also his goods. Mr. Thiers received, in October, 1870, a safe-conduct which permitted him to go to Versailles for a conference with the German authorities. When a field hospital which has been left in the territory occupied by the enemy rejoins its post, after having been relieved, it receives a safe-conduct with instructions as to the itinerary it must follow.

**SAFEGUARDS.** A safeguard has for its purpose to place under the protection of a belligerent, establishments or persons which are within the zone of operations; such are establishments sacred to worship, to the arts, to science, to instruction, to charity, or the dwelling place of a diplomatic agent or of a personage to whom it is desired to render particular

honor. The premises of any citizen may also be so protected.

There is a distinction between the dead safeguard—a simple order or notice not to touch an establishment—and the live safeguard, where the occupying force sanctions and accentuates this special protection by posting a sentinel or a picket. In the case of a live safeguard, an interesting question presents itself: The enemy has placed a sentinel before an establishment in the country of the adverse party, the latter makes a return offensive movement and the sentry falls into his power. Is he a prisoner of war? There is nothing laid down regarding the live safeguard, but there is a custom; the custom is that such guards are not made prisoners. It is in the interest of the establishment—in the interest of the enemy—that the sentinel was posted; it would be too much that the sentry should suffer under such conditions. There is an analogy of fact, but not an identity, between this and the picket posted at a sanitary establishment for the purpose of maintaining order therein; the armed picket does not cause the hospital to lose its charitable character, and it should be remembered that the question raised at Geneva in 1906, “Should the picket and the sentries protecting the sanitary establishment be considered as prisoners of war?” was decided in the negative.

**CAPITULATIONS.**—The most important convention, because it arises in every war, is a *capitulation*. In international law the word *capitulation* has another meaning: Thus Switzerland, before 1848, entered into “capitulations” with certain other states, principally France, to furnish them with regiments; in the same way one distinguishes “countries of capitulations” as those where foreigners occupy a peculiar status due to the powers granted to consuls. The capitulation which we are now

discussing is a war convention which causes to be known the conditions under which the struggle ceases. In a broader sense the expression "capitulation" indicates the fact of surrender; it may be pure and simple, as where the conqueror requires that his adversary surrender at discretion, confiding in the generosity of the conqueror; or, in a contrary sense, where the conquered may not wish to make an appeal to the generosity of the conqueror, and says to him: "Do with me what you will." The latter case was presented at Phalzburg in 1870. There is in such a surrender no convention properly speaking; it is a condition of fact.

There were in 1870 a certain number of capitulations; after the war a court of inquiry was instituted by the French government before which appeared all the military chiefs who had signed capitulations. The court blamed in certain cases and praised in others. As a result of its conclusions, the officer responsible for the capitulation of Metz was brought before a court-martial.

The Germans treated with generosity Major Taillant, the governor of Phalzburg, who, after an heroic resistance of four months, spiked his guns, destroyed his matériel, opened the gates of the city, and surrendered at discretion on December 12, 1870. To honor this fine conduct, the enemy allowed the officers to retain their arms, the men their knapsacks, and granted to all the choice of their place of detention. The court of inquiry of 1872 had nothing but words of praise for Major Taillant.

It is particularly in matters of capitulation that military chiefs have great responsibility; they must conform to the regulations of their own country which indicate the method under which they are allowed to surrender. In most European countries specific regulations exist as to how and when a mili-

tary commander may capitulate. Our regulations are silent on the point but the Articles of War touch upon it somewhat. Thus the 42d Article provides that any officer or soldier who shamefully abandons any fort, post or guard, which he is commanded to defend, or speaks words inducing others to do the like, shall suffer death or such other punishment as a court-martial may direct. The 43d Article provides that if any commander of any garrison, fortress or post is compelled by the officers and soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.

As an illustration of how minutely and carefully these matters are regulated in the great armies of Europe we will take as an example the French regulations. These regulations consider two classes of capitulation; the capitulation of a stronghold, and the capitulation of troops in the field.

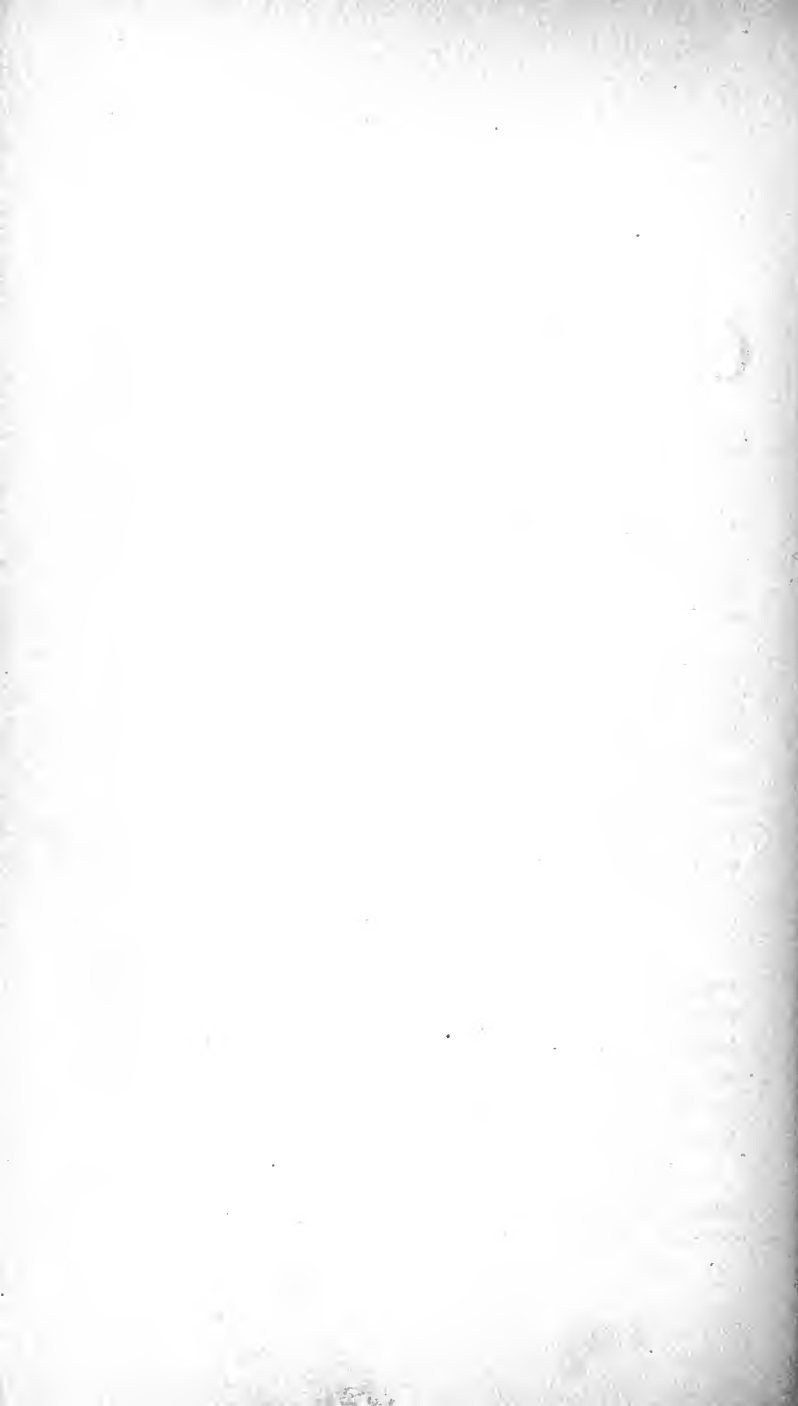
**CAPITULATION OF A STRONGHOLD.**—One can understand that a stronghold may be obliged to surrender when it has no more food, nor any means of defense. The French regulations of October 14, 1891, express this idea, in Article 196:

“When the governor judges that the last term of resistance has been reached, he consults the council of defense in regard to means of prolonging the siege. The governor having listened to the council, and the meeting having adjourned, takes of his own motion the resolution which his feelings of duty and of responsibility suggest to him. In all cases he does this alone; upon his own responsibility in regard to the time and the terms of the capitulation. In no case must he surrender the place before having destroyed the colors.”



The question has been raised as to whether the commander of a military stronghold, not having exhausted all his means of defense, might not justify a capitulation on the ground of preventing a bombardment or of procuring advantages for his country. The commandant of a post has no right to place himself on the political terrain and to anticipate advantages which may prove ultimately only illusory; he cannot tell whether, by holding on for a few days, and thus holding the enemy, fortunate consequences may not follow. Article 209 of the French Code of Military Justice answers this question:

“Is punishable by death, with military degradation, any governor or commander who, tried, on the recommendation of a court of inquiry, is found guilty of having capitulated with the enemy, without having exhausted every means of defense at his disposal, and without having accomplished everything which was prescribed to him by duty and honor.”



## NINTH LECTURE

---

**C**APITULATION IN THE OPEN FIELD. — If the French military regulations admit of the capitulation of a stronghold, it is not the same in regard to the capitulation of troops in the field. Their Article 210 says:

“Every general or commander of armed troops who capitulates in the open field is punished by *death* with military degradation if the capitulation has resulted in causing his troops to lay down their arms; and by cashiering in every other case.”

Capitulation in the open field is never justified. This was one of the ideas of Napoleon on the capitulation of Belem, which was the beginning of his defeats. It is, by the way, an extremely interesting question of military history to know whether General Dupont was as culpable as Napoleon claimed. The accusations against him have been breached, during the past few years, by a military writer, Colonel Titeux, who has devoted himself to the question.

The convention of The Hague says but little in regard to capitulations. It only sets forth certain summary rules and differentiates from them those clauses contrary to honor: “Capitulations agreed upon between the contracting parties must take into account the rules of military honor. Once settled, they must be scrupulously observed by both parties.”

**OBJECT OF CAPITULATION.** — The purpose of capitulations should relate to the following clauses:

1. The fate of the garrison.

2. The turning over of the place and of the matériel of war.

3. The fate of the inhabitants.

Any other clauses which might have a political character, which would not concern the commandant of the place, should be considered as void, since they would not be binding on the government unless the latter should take occasion to ratify them. Thus Genoa, besieged in 1814 by an English squadron, surrendered under the condition of becoming once more a free and independent republic; the governments of the allied powers did not ratify this clause and Genoa was attached to the government of Sardinia. In 1870 the governor of Verdun surrendered the place, stipulating that all the matériel should be returned to France after the war; the court of inquiry of 1872 blamed him for having agreed to such a clause which might have led him to hasten the capitulation for an advantage which the enemy had the right to decline to recognize. In the capitulation of El-Arish, concluded between Sidney Smith and Kléber, the latter was wrong in carrying into execution certain clauses, and in commencing the evacuation of certain places in Egypt before he was assured of the ratification of the English government. This ratification was not given; some time afterward took place the battle of Heliopolis, and Kléber was assassinated.

For military capitulations, it is seen that sometimes there must be a ratification; this ratification should not be understood in a political sense; generally the capitulation is preceded by negotiations conducted through staff officers to whom the commanding generals delegate their powers, reserving to themselves the right of ratification. From the moment a convention is signed it binds both parties; so long as it is not signed he who capitulates has the right to do what he pleases, and may destroy all matériel which

he does not wish to see fall into the hands of the enemy; but after the signatures have been affixed, things must remain as they are. It is a question of good faith. After the capitulation of Metz many colors were burned; the Germans were justified in blaming the French for this.

In a capitulation the first thing to determine is the fate of the garrison; in many of the capitulations of 1870 liberty on parole was granted to officers. Sometimes it was in the form of a limited liberty; they were to go freely to a place designated; in certain cases it took the form of complete liberty; they gave their word of honor not again to bear arms against Germany. Article 1 of the capitulation of Peronne stipulated: "That they were by no means to act against the interests of Germany"—a vague formula, which placed the officers in an intolerable position \* and which the commandant of the place should not have allowed to be inserted in the capitulation; it was, besides, forbidden by the French military regulations, which prohibit officers from separating their fate from that of the troops. All the commandants of posts who, in 1870, asked for liberty on parole for their officers were censured by the court of inquiry of 1872.

A capitulation should set forth the measures which shall be taken for the surrender of arms and matériel—the place, the time of turning over, and a whole series of details as to the dispositions to be made.

In regard to the fate of the town, the question presents less importance than in former days. It is now settled that pillage is forbidden and that the inhabitants must be respected. Clauses may be

---

\* The same vague, and therefore objectionable terms of paroles, were imposed at Sedan and at Metz. (See appendix.)

introduced having for their purpose to exempt the inhabitants from certain of the charges of war. The inhabitants of Peronne benefitted from such conditions by reason of the energetic resistance of that city. There are, sometimes, clauses concerning the sick and wounded, but in general, it is sufficient to call attention, in regard to them, to the Geneva convention.

VIOLATIONS OF CAPITULATIONS. — A capitulation should be respected by both parties and carried out in good faith. There may be, however, a failure to execute clauses either by the besieged or by the besieger; this case is always blamable. In regard to violations of capitulations, a distinction must be drawn between individual and collective acts. We find a deplorable example of an individual violation at the time of the surrender of Laon in September, 1870. Hardly had the last French troops left the place when a terrible commotion was felt; the powder magazine had exploded, causing the death of more than 300 Frenchmen; the Germans had two officers and 54 men killed and 126 officers and men wounded. The artillery store keeper, Henriot, through a mistaken sentiment of patriotism, blew himself up, carrying with him more Frenchmen than enemies. The governor-general of the place was suspected of complicity—he should be relieved of this suspicion; he was, by the way, seriously wounded in the explosion and died as a result of his wounds. In 1757 the English did not carry out the capitulation of Closterseven, under which a part of their army was to remain in inaction. The conqueror was very imprudent to leave at liberty the vanquished army and to submit its good faith to such a strain; one should *count* on the good faith of one's adversary, but one

should *act* as though he were expected to violate the convention.

**SUSPENSION OF ARMS.**—A suspension of arms is an essentially military convention; it is not mentioned in the proceedings of The Hague, probably because it is very limited in duration and would not warrant discussion in law. Between the suspension of arms and the armistice, the terminology is not yet fixed; in English we have but one word to express the double idea, whereas Germany and France have two. (*Waffenruhe*, *Waffenstillstand*.) A suspension of arms is most often verbal, with an effect limited to a few hours, or to a few days, to gather the wounded, inter the dead, or to allow a meeting with a capitulation in view.

**ARMISTICE.**—The situation is different when it has regard to an armistice. An armistice is a semi-political convention because it leads, almost always, to the supposition that peace will be concluded. Peace may be concluded without an armistice (Peace of Westphalia); in our days hostilities are generally suspended during the conferences. The military chiefs have not powers sufficient to enable them to conclude peace; they would need *special powers*. The armistice lasts for a certain length of time. It is ordinarily intended to facilitate negotiations; the treaty of peace signed at Paris, which brought to a close the Spanish-American war, was preceded by the armistice of Washington, negotiated by Jules Cambon, then the French ambassador to the United States. However, an armistice may be signed after the conclusion of peace (Russo-Japanese war), \* when hostilities terminate before the treaty of peace can receive execution.

Sometimes an armistice becomes a truce; it is then intended not to prepare for peace but to supple-

---

\* See appendix.

ment it. In our days the case is rarely presented, but in other days, when a war was prolonged without success for one side or the other, a truce was arranged. It was intended to be indicated thereby that the quarrel was not satisfied, that no one renounced their pretensions, and that the question which led to the war might lead to new conflicts. Such were the truces between the Turks and the Christians. There could not be peace, the Koran prescribing a perpetual war against Christians. Nowadays peace is concluded, even where there is an idea that it will not endure; the hope of revenge may remain—a hope which is not always realized; in 1871, when France and Germany signed the treaty of Frankfort, each of the two powers certainly had the idea that peace would not endure for more than forty years.

We have recently seen a treaty of peace take upon itself the character of a truce. From 1879 to 1884 there was, on the Pacific coast, war between Peru and Bolivia on one side and Chile on the other. Between Chile and Bolivia the only result was an indefinite truce, which is to be denounced a year in advance. Peru and Chile, on the contrary, entered into a treaty of peace, which presents a very interesting peculiarity: Two provinces, rich in nitre, were ceded by Peru to Chile; at the end of ten years the inhabitants were to be consulted to determine whether they desired to remain Chilean; if so Chile was to pay an indemnity to Peru. The plebiscite has not yet taken place, it having been impossible to reach an understanding as to the mode of conducting it, since it was to occur a certain length of time after the cession, and not before, as would have been rational, and as had been the case with Nice and Savoy, and with the kingdom of Naples.

The armistice not being an exclusively military



convention, requires direct representatives of the interested governments, furnished with special powers. It is thus that the convention of armistice of January 28, 1871, which at the same time arranged for the capitulation of Paris, was concluded between Count Bismark, representing the German emperor, and Jules Favre, the minister of foreign affairs of France.

It is essential that an armistice, once concluded, should be made known immediately, and in exact terms, to the civil authorities and to all military commanders. The disaster to the French Army of the East in 1871, which led to unjustifiable accusations against the Germans, was due to the careless and incomplete publication by Jules Favre, of the terms of the armistice of January 28, 1871.

The determination of this armistice did not indicate a very great diplomatic experience in the French representative, and the method of publication was of a character so frivolous that it might be deemed culpable; thus, the armistice was only to be effective in the Departments after January 31st and the Army of the East was left out entirely. No mention of this was made in the French telegram to that Army sent, in order to secure haste, by the German route. Count Bismark, who countersigned the dispatch in which Favre announced the armistice, observed the error, but he was within his rights in not calling attention to it. It would have been a generous act on his part had he done otherwise. Count Bismark had no idea, however, of conducting war on sentimental principles.

As with every convention, a convention of armistice lays down the law for the parties. And in order to avoid any divergent opinions it is therefore necessary that all its details should be prepared with care, particularly in so far as regards its length, its scope, and its effects.

1. LENGTH.—Very great precision is necessary.

It should not be said that: "The armistice will last from the tenth of January to the fifteenth of February," for example. This would be too vague. According to the interpretation, these days might be included or not in the length of the armistice. Therefore, the dates and the hour of the beginning and of the ending, should be mentioned.

Sometimes an armistice will have an indefinite length, — undetermined because it cannot be known how long the peace negotiations will last. It will then be stipulated very carefully how it shall ultimately be denounced, and after what delay; starting from this denunciation, hostilities will recommence. An armistice may in any case be prolonged even it was concluded for a fixed time. It was thus that in 1871 the armistice between France and Germany was successively extended from February 19th at noon, to February 24th, then to February 26th, and then to March 12th. The extension must be agreed to by the same parties that agreed to the armistice.

2. SCOPE. — The range of an armistice is not always the same. Sometimes it has a general character; it then suspends hostilities on land and at sea. Sometimes it is only partial and is only applicable to operations at sea, or only to those which take place on land; sometimes, even, it extends to only a portion of the territory. In 1871 when Jules Favre notified the French troops of the armistice, his telegram was sent by the field telegraph of the Germans. He did not make known that the armistice did not apply "to military operations in the Departments of the Côte d'Or, of the Doubs, and of the Jura, or to the siege of Belfort." Bismarck confined himself to countersigning the telegram. He has been attacked for this. According to us this was unwarranted. Bismarck was not required to correct the errors or the mistakes of the French government. We know the

unfortunate results which this careless conduct of the French foreign minister had, under the circumstances, for General Bourbaki's army. The telegram sent by von Moltke to General von Manteuffel, who had the army of Bourbaki as his objective, is characterized by its "*imperatoria brevitás*," and states, in a few clear and precise words, all that was agreed upon.

3. EFFECTS. — In regard to this point one must be very careful, in order to avoid difficulties.

Certain results are necessary, that is, that without them an armistice would not be in contemplation; cessation of hostilities, no more effusion of blood, no more combats, no more reconnaissance, nor attacks, nor bombardments, nor works of approach. A line of demarcation will be traced, or better, a strip of land or a neutral zone, several kilometers wide will be established, which the troops are not to penetrate. At the most there will be left thereon a certain police force and a mixed commission charged with determining on the field any difficulties which may arise.

Behind these lines each belligerent may do as he pleases; exercise his troops, raise additional troops, etc., and exercise over the territory he occupies the rights of a belligerent, because an armistice is not peace. It was by virtue of this principle that the Germans maintained the right of requisition in 1871. But, outside of what has been said, the liberty of action of the belligerents during an armistice may lead to doubts; the question—in other days a classic, but very much less interesting in modern warfare—is that of knowing if the belligerents may repair breaches in their works during an armistice when there are no clauses in regard to this point in the convention, in so far as concerns a besieged city. Some say that a belligerent may not do, during an armistice, that which he could not have done if the struggle had continued. This rule is too absolute,

because it would require us to admit that troops may not rest themselves; others claim that everything which is not forbidden is permitted. In order to avoid any misunderstanding and any accusation of bad faith, the question should be determined in each case by an express accord between the contracting parties.

A more complex question, and one often discussed, is that of the revictualing of a besieged place. The country to which the place belongs will make an effort to effect a revictualing during the armistice. In other days, an effort would be made to revictual a place still capable of resistance, the remaining places being turned over to the besieger. The question is presented under a double aspect:

1. Should an armistice necessarily contain a revictualing clause?

2. Lacking this clause, may one, after signing an armistice, insist upon a revictualing?

In October, 1870, Mr. Thiers wished to negotiate an armistice which would have permitted elections to be held and a legislative assembly, capable of accepting a treaty of peace, to be convened. Mr. Thiers asked that during the armistice, Paris might be revictualled and that the army of investment should allow the necessary provisions to pass. "If the armistice does not end in peace," said he, "it is necessary that when it ends the belligerents should find themselves in the same situation as at the beginning of the armistice. Besieged cities should therefore be permitted to revictual themselves in proportion to the length of the armistice, otherwise the besieger would profit from the consumption of food resulting from the very length of the armistice." Bismark did not wish to allow the revictualing except on the condition that one of the forts of Paris be ceded. While this was going on, the insurrection of October 31, 1870,

which interrupted the negotiations, broke out in Paris. The claim of Bismark was wrongfully considered very unjust. As a matter of fact, the question was not one of right but of interest alone, which each of the contracting parties was at liberty to consider from its own standpoint.

Where the question may become threatening is where the armistice is silent in regard to revictualing. May the besieged place revictual itself? To ask the question is to answer it. It is certain that the *status quo* should be maintained. As a matter of fact, when revictualing clauses appear in an armistice, they set forth the dates, and the points determined upon, when and where the trains may cross the lines. The besieger being master of his lines, the besieged can not assume the right of causing them to be opened to his trains, outside of any convention. We must apply here what has already been said in the case of a siege in regard to useless mouths being allowed to depart: there exist only the rights of humanity limited by military necessity, rigorous but indispensable.

In the armistice of January 28, 1871, there are clauses on revictualing. But they are all of a particular character, since Paris had capitulated. The Germans were under the necessity of seeing that the revictualing of Paris did not interfere with their own methods of revictualing by making food scarce.

Another question presents itself with regard to an armistice: may the inhabitants of the country circulate freely between the two armies? This is a question for the belligerents to decide, they alone being capable of appreciating the advantages or disadvantages of any freedom which they might permit in regard to this. In 1871, in France, facilities were granted because of the elections, and not a few people profited by this to procure for themselves safe-conducts under pretense of being electoral candidates,

a matter in regard to which the truth clearly could not be verified beforehand.

In any case an armistice is not peace, even temporarily. The state of war continues, and with it all the rights which follow. The application of the laws of war does not cease.

**VIOLATION OF THE ARMISTICE.**—An armistice is to last for a certain length of time. But the convention is subject to denunciation, if its terms be not observed, this is a natural right. Between individuals a judgment is not necessarily a matter of right, it is the judge who pronounces it. Between nations or between armies one party considers itself no longer bound when the other party has failed in its engagements. Then comes in the application of the maxim: "one takes the law into ones own hands," and the struggle recommences, because one may not only repel an attack at a point where it is made in violation of the armistice, but also take the offensive at other places.

However, in order to avoid any accusation of bad faith, an individual violation must be distinguished from a collective one. An act of violence committed by an individual or by an isolated soldier, would not carry with it the violation of an armistice, properly speaking. It would give the right to claim punishment for the culprit, and if there should be occasion for it, indemnity for the loss suffered. In order that there shall be a violation, there must be a reprehensible act on the part of the troops of one of the contracting parties.

**RELATIONS OF A BELLIGERENT WITH THE POPULATION OF THE ENEMY'S TERRITORY.**—These relations are at least as hard to determine as those between the belligerents. A belligerent may find himself in contact with the inhabitants of an enemy's territory, under two different situations:

1. Invasion, which is the material fact of penetrating the adversary's territory. One struggles to maintain oneself there; one may be forced out; it may be only a passing incursion.

2. Occupation. One has penetrated into the enemy's country; the struggle has passed beyond. One is established on a portion of the territory where hostilities have ceased and where one may act as master. This is the "occupation of war." The expression is more restricted than that of "military occupation."

MILITARY OCCUPATION.—This term is applied to the case where troops operate in a country which is not their own, and the case may result from very varied circumstances. For instance, the legal sovereign of a country may call upon a foreign force to help resist insurgent troubles which menace his authority. This is called "intervention" in the interior affairs of a country. In the period of reaction which followed 1815, Austrian troops were sent to Piedmont, to Naples, and into the Papal States to suppress liberal movements. In 1822 France intervened in Spain; its troops remained there for a certain length of time with the consent of the very uninteresting Ferdinand VII, for the purpose of maintaining order, which had been restored for his benefit. The French occupied Tunis, at the start, without the consent of the sovereign of that country; they remained there with his consent, and the occupation is therefore no longer in enemy country but in foreign country, because it depends on another sovereignty than that of the occupant.

Today, as a matter of law, there exists a very curious occupation; it is that of the Ottoman countries of Bosnia and Herzegovina by Austria-Hungary. Article 25 of the treaty of Berlin has not yet been abrogated, but Austria has understood its right of

police in a more than broad fashion, since one has been able to see for some time in Vienna, Bosnian troops in the service of Austria, and the latter power has just announced in a very cavalier way, that it has purely and simply annexed these two Turkish provinces which had been confided to its care. This is a proclaimed right of conquest in full time of peace. As a matter of fact, it is but just to add that there has been but little change, since the authority of the Sultan, the nominal sovereign, was not great. But as a matter of law the change is serious. There is presented, particularly, the very grave fact of a treaty modified by the will of only one of the contracting parties. Russia had done the same thing in October, 1870, in regard to the neutralization of the Black Sea.

Crete, under the nominal dependence of the Sultan, has been occupied by four European powers and administered by a special commissioner designated through an understanding between these four powers and upheld by a species of international gendarmerie.

It may be said that the French occupy a portion of Morocco with the tolerance of its Sultan, but they went there without his authorization, but as the result, however, of the murder of French nationals. Their right of occupation is a simple fact.

In the same way the English have occupied Egypt, since the bombardment of Alexandria in 1882, and they have maintained themselves there through the tolerance of the interested powers.

LEGAL RIGHTS OF THE OCCUPYING POWER. — When an army occupies a country, one must admit that that army has certain autonomous legal rights, and that it may protect itself, should the case be necessary, by the use of its own military system of justice. France had occasion to assert this view in 1881 in regard to the occupation of Tunis. That country was then under the regime of "capitulations." For-



eigners were thus subject to the sole justice of their consular tribunals. Many attempts at murder were committed against French soldiers by Italian subjects whose national sentiments were irritated by the French occupation. At the beginning, these subjects were turned over to the Italian consular authorities, who showed themselves very weak in the repression of offenses, and who, in the case of crime, would send the authors thereof to Italy; in most cases this amounted to immunity. The French could not tolerate such a condition. They were occupying Tunis by the wish of the territorial sovereign, the Bey of Tunis; but the latter did not have the right to pass judgment on foreigners and could not turn over the right to the French. A commission of jurisconsults, assembled at Paris in 1882, studied this delicate question; the commission was unanimous in deciding and in proclaiming, that an army in a foreign land had the right to cause itself to be respected and to defend itself through its own jurisdiction. As a result of this decision, courts-martial took cognizance of the crimes and offenses committed by the Italians, whose attempts at once ceased. It may be said that sometimes (it was the case with regard to the occupation of Rome by the French from 1849 to 1870), the sovereign who has begged the intervention of a foreign army leaves to that army the right to exercise, by an implied concession, a certain authority. This could not be done in the case of Tunis. It was necessary there to affirm that, by the nature of things, an army may protect itself by means of its own judicial powers.

This is what should be held with regard to the French troops landed at Casa Blanca on the Atlantic coast of Morocco; the question was submitted to The Hague with a view to determining whether the French army in Morocco might cause its military tri-

bunals to take action in regard to deserters, even though they were not Frenchmen.

**MILITARY OCCUPATION BY WAY OF GUARANTY.**—Such an occupation takes place through a convention between the legal sovereign of the occupied territory and the government to which the occupying troops belong. It is thus that a vanquished country may have to submit to the occupation by the conqueror by virtue of a treaty of peace, and to insure the execution of certain clauses of the treaty. The occupation serves as a security, for example, for the payment of a war indemnity. It may last for a shorter or a longer time. As a result of the Franco-German war, there was an agreed-upon military occupation of certain of the French departments by the Germans. The evacuation was gradual and was accomplished as the partial payments of the war indemnity were made. Under this system, the legal sovereignty of the occupied country is respected, special clauses of the treaty of peace safeguarding this and reconciling it to the sovereignty of fact of the occupying forces.

**OCCUPATION AS A WAR MEASURE.**—In a war occupation there is no convention or understanding between the belligerents. It is a situation of fact of an essentially temporary nature. It will cease entirely, even during the course of war, if the occupant be chased from the occupied territory; or if the war occupation is transformed with the arrival of peace into an evacuation pure and simple, or into a military occupation, by agreement, in the nature of a guaranty, or by the cession to the enemy of the territory occupied by him. In 1870-71 Burgundy and Franch-Comté were occupied under the head of a guaranty; then evacuated; whereas Alsace-Lorraine, which was occupied, was abandoned by France to German sovereignty.

When war ends without a treaty of peace, occupation changes of itself. The unfortunate adversary, annihilated, completely disappears, absorbed by the conqueror by the very fact of war. No treaty of peace is possible. It is under these conditions that Algeria was conquered by France; there was only a capitulation of which certain stipulations are still in vigor in regard to that which concerns the situation of the native Mussulmans: respect for their laws and for their traditions.

In 1866 Prussia aggrandized itself by the duchies on the Elbe, Schleswig and Holstein; there were treaties by virtue of which Denmark recognized in Prussia and in Austria sovereign rights over these duchies. Austria ceded at Prague, in 1866 to Prussia, the rights of co-dominion established in 1865 at Gastein. The Kingdom of Hanover and the free city of Frankfort were incorporated in Prussia by a Prussian law. The private property of the King of Hanover was confiscated, and Bismark used it to create the "reptile fund" with which he incited the press to awaken a Prussian sentiment in Hanover.

The same thing occurred in the South African war. The commander of the English troops declared the country annexed as early as September, 1900, and it was only in June 1902, that there was a capitulation in which certain Boer chiefs joined. These became, soon after their return home after the struggle, the chiefs of the colonial government, which had become autonomous. A species of South African confederation has been organized, of which Pretoria is the capital. We have here an act of very wide confidence on the part of England towards a country which had been subjugated, quite harshly on the whole. (The English have been criticized for employing Kaffirs as soldiers and with putting on foot other reprehensible means.) There was no treaty of peace; there was

"debellatio," according to an old expression, that is to say complete defeat. The conqueror imposed his absolute will. The Boer chiefs have shown, since then, a loyalty which has entirely justified the confidence of England but which many governments would not have dared to imitate.

On a special point, a war occupation, which is a pure matter of fact, may lead to a convention. It is in the case of a place that capitulates after an honorable resistance, of which the conqueror is willing to take notice by abstaining from exercising certain rights. The capitulation will indicate the conditions of the occupation which the military chiefs may have the right to negotiate, within the scope of their authority.

CONVENTION BETWEEN A BELLIGERENT AND A MUNICIPALITY.—The question has been presented of whether the municipal government of an open city might also make conventions with a belligerent. We must draw a distinction.

If an open city has been attacked and has defended itself, and a convention results between the municipality and the occupying force, this convention should be respected.<sup>4</sup>

The case would be different if it had relation to an open city where there had been no struggle. It is thus that the convention concluded on September 19, 1870, between a Prussian officer under a flag of truce and the City of Versailles was not ratified by the Prince Royal. There had been no defense of the city, and the convention did not seem justified. On the other hand, a convention entered into by the city of Dijon, which had defended itself, was held good.

It has also been asked whether the municipal authorities have the necessary powers to enter into a convention with the enemy. One may not reasonably expect that the laws of a city should regulate

such questions. A municipality which tries to treat with the enemy should be careful to remember that it does so on its own responsibility. Clearly, such procedure, hardly comes within administrative law; but, nevertheless, an act of a municipality should be considered as valid if it has for its purpose to care for the interests of the locality without losing sight of those of the country. We must consider interests and common sense more than the formal rules of the law, and interests and common sense join to show the reciprocal advantages for the occupant and occupied to be derived from sustaining municipalities and their work in so far as regards conventions with the enemy.

Occupation being purely a matter of fact, some have thought that it excludes all judicial considerations. They said:

"If the occupant maintains some moderation, respects persons and goods, it is above all because it is his interest to do so. It is not possible to regulate the relations between the occupant and the occupied; one must leave to the occupation its character of violence, and to impose conventional rules would be to recognize in the invader certain rights and to appear to render them legitimate."

This opinion cannot be accepted; a set of legalized regulations is at least as necessary between the occupant and the occupied as between the belligerents themselves. Besides, those who refuse to recognize a bond of law between the occupant and the occupied seek, nevertheless, to impose on the invader certain rules, in the name of his own interests, of which he should be, it seems to us, the sole judge.

The exaggerated susceptibility which would forbid any convention of this nature to be concluded, on the pretext of not recognizing the right of force, simply leads to allowing every latitude to the occu-

pant. The purpose of conventions is not so much to recognize in the adversary the right to do such and such a thing as it is to limit what he may do. At the conference of Brussels the Belgian delegate, in a tragic speech, showed a patriotic inhabitant receiving information at the stake, to which an act of patriotic heroism had led him, of a convention which had been accepted by his government, and by virtue of which the enemy was punishing him for the manner in which he had devoted himself to his country.

It was the representatives of the smaller powers, which are more particularly exposed to invasion, who, at the convention of 1907, showed signs of a keen susceptibility in this regard. They were opposed to the preparation of a "code of defeat" for the use of the conqueror. Mr. de Martens replied, very judiciously, that it was rather a question of elaborating the statutes of "an insurance society against mutual abuses." An artifice of editing dissipated the last hesitations. The convention of 1907 is very short, but is followed by a set of rather long regulations. And by virtue of Article 1 of the convention, the contracting powers engage themselves to give to their troops instructions conforming to the regulations. The procedure is a longer one, but it amounts as a whole to fixing limits to the undefined action of the occupying power. Therefore, when measures are taken by the troops in enemy territory, it is by virtue of instructions given to these troops in accordance with the regulations accepted by the various states, and not by virtue of any right conferred by the sovereign of the invaded country. This distinction is rather subtle.

The requirements of the regulations are obligatory. Article 3 of the convention establishes the principle of the payment of an indemnity by the belligerent party which shall violate their provisions.

## TENTH LECTURE

---

### Occupation and Conquest

IN other days, occupation and conquest were rather easily confused, so that by the sole fact of occupation, the belligerent considered himself as having the right to conduct himself as a sovereign, having the right, for example, to exact from the inhabitants an oath of fidelity, to coin money, to raise troops, etc.; things are not done in the same way to-day. And it is admitted that while the occupier has certainly an authority of fact over the occupied territory, this authority must combine itself with the rights of the legal sovereign. This amalgamation is not always easy. From the dualism a situation has arisen which is unfortunate, even painful, for the inhabitants. Art. 44 of The Hague rules has tried to remedy this by warning the invader not to require of the invaded people services which would be at variance with their duties to their own country or which would disturb their conscience. These moral ideas constitute real progress, but it is not yet enough.

WHEN IS THERE OCCUPATION?—By reason of the importance of the consequences which occupation entails it is important to know when it may be said that there is an occupation or when a simple invasion. We have seen how, in case of invasion, the inhabitants might participate in the struggle as belligerents (Art. 2 of the rules of The Hague.) But this Art. 2 is applicable only in *unoccupied territory*. What may happen in occupied territory is not mentioned. As a consequence, the tendency of a belligerent will be to readily consider a territory as under

occupation by him, because then he may repress with vigor such acts of the inhabitants as are opposed to his interests, and this will greatly strengthen the action of his army.

The rules of The Hague (Art. 42) state:

“Territory is considered occupied when it is actually placed under the authority of the hostile army.

“The occupation extends only to the territory where such authority has been established and can be exercised.”

It may therefore be said that in an effective occupation two elements are found: (1) the positive element—the occupant is able to make his authority respected; (2) the negative element—the legal sovereign of the occupied country is not able to do so.

NOTIFICATION OF OCCUPATION. — It is desirable that the occupant notify the inhabitants of the fact of his occupation in order that the population may know what it has to expect, and may recognize the risks which it runs in giving itself over to acts contrary to the interests of the enemy. The Hague convention does not speak of such notice, but it would seem that the interests of the occupant and of the occupied demand it.

INSURRECTION IN OCCUPIED COUNTRY.—A most unfortunate case is that of an insurrection in occupied territory. The population accepts the presence of the enemy; it submits itself then suddenly, as the result of plots, soldiers of the occupying army are murdered. This is evidently an act of perfidy, and one which merits punishment; but one should not confound this criminal action with open rebellion which occurs when the inhabitants rebel by an understanding with the troops of their own country. The position of the population then becomes difficult to qualify, and while it would be an exaggeration to apply to its conduct



the term "treason," the occupant certainly has the right to punish the inhabitants who have taken part in an action against him (and this over and above any individual odious act of murder and of brigandage), because it was understood that the inhabitants were not to be disturbed but this only on condition that they remained inoffensive. Sometimes extremely vigorous measures have been taken, not only against inhabitants who had taken part in the acts of violence, but even against populations which were considered to be merely moral accomplices. A belligerent has not the right to punish the parties to a collective rising by treating them as brigands or assassins.

This question has not been determined in a precise way; it was hardly possible in a short time to establish a general rule, since everything in the case depends upon the circumstances. It is to this, that reference is made in the preamble of The Hague convention, which offers as a sole solution, that in unforeseen cases belligerents must be inspired by the general rules of international law and the laws of humanity—very vague terms but which it was difficult to make more specific.

Here again, as in the case already mentioned, the word treason must be taken in the foreign or international sense and not in the American. No allegiance is due from the population of occupied territory to the sovereign of the occupying army. (Treason with us is an extremely technical offense.)

RELATIONS BETWEEN THE OCCUPANT AND THE OCCUPIED COUNTRY.—The occupant has two ends in view:

- (1) To protect his troops against attack.
- (2) To interrupt the relations of the population with its own legal government.

From this there results, between the occupant and the population of the occupied country, complex

relations which may be classified under three heads as follows:

- (1) Legislation in the occupied country.
- (2) The administration of justice in the occupied country.
- (3) The economic and administrative measures which the occupant may take.

(1) **LEGISLATION APPLICABLE TO THE OCCUPIED TERRITORY.**—This legislation may have two sources: one, the principal, the law of the invaded country and, second, the will of the occupant.

The occupation being a provisional situation and not a conquest, the local laws do not disappear. If the occupation becomes final, the occupant, becoming a sovereign in fact, may do what he pleases. In other times annexed provinces retained their legislation, but now there is a tendency to make the law uniform for all sections within the new confines of the state.

Today, therefore, the rule consists in maintaining the legislation in existence; this is what Article 43 of the rules of The Hague expresses as follows:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, *unless absolutely prevented*, the laws in force in the country.”

“Unless absolutely prevented,” says the article; we must of course admit that the occupant may modify or suppress laws which are objectionable to him, as for instance a law in regard to the freedom of meetings and of the press; in the same way, he will prevent the application of the laws in regard to recruitment. But outside of these exceptions the occupant must maintain the legislation in force; such is the new and present principle.

A contrary view to a certain extent, was apparently formulated in G. O. 100, 1863; which considered proper the suspension of the civil and criminal law in the occupied country.

While it is true that G. O. 100 holds that "Martial Law" consists in the suspension of the criminal and civil law and of the domestic administration and government in the occupied place or territory, and the substitution therefor of military rule and force, it also provides for the retention of the administration of the local law when deemed advisable. The difference today, therefore, is rather one of form than of substance for one need not allow the operation in occupied territory of laws which are objectionable to the invader, and normally the latter will always have preferred to be saved the trouble of changing a system when the existing one will serve.

A second source of legislation is the will of the occupant. He has the right to repress certain acts of the inhabitants: cutting of telegraph wires, communication with the enemy, insurrection; but he must avoid summary executions and not insist, in a tyrannical way, on collective responsibilities, as the Germans did in France, in 1870.

In regard to this, Article 50 of The Hague rules decides that:

"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible."

(2) THE ADMINISTRATION OF JUSTICE IN THE OCCUPIED TERRITORY. — In occupied territory, justice must be administered under two forms working along parallel lines:

(a) Under local jurisdiction.

(b) Under the jurisdiction of the occupant.

(a) LOCAL JURISDICTION. — Local jurisdiction

will be in force at all points where the national laws of the occupied territory are in force. This is natural; but there are restrictions imposed by the very nature of things; thus, local jurisdiction cannot, evidently, take knowledge of acts, criminal in themselves under the local law, committed by the inhabitants in the interest of the occupant; such acts are, in the eyes of the local population, acts of treason which they could not pass judgment upon without placing themselves in rebellion against their *de facto* sovereign, the occupant. They may simply make a note of them with a view to establishing a basis for a later prosecution when the sovereign *de jure* shall have resumed possession of his full sovereignty. It was thus that in 1870 a German, established in Nancy before the war, having undertaken, during the occupation, to furnish supplies voluntarily and for his own profit, to the German armies, was prosecuted at the end of the war under the 77th Article of the French penal code. This German was domiciled in France and was, therefore subject to the French penal law. He should have respected it.

The occupant has every interest to see that local justice follows its course; therefore he should assist it by lending to it the strength of his public force—this may be necessary since the local authority has no other force at its disposal. It has sometimes been suggested that the acts of local justice were vitiated by the fact that the criminal had been arrested by an agent of the occupant. There is here an unreasonable idea, which would render impossible the working of national justice.

HOW SHOULD JUSTICE ITSELF BE RENDERED?—It should be rendered in the name of the legal sovereign. The idea—a very clear one today—which distinguishes occupation from conquest, cannot permit that local justice should be rendered in the name

of the occupant. In 1870 the Germans did not wish to have justice rendered in the name of the Government of the National Defense, which was not recognized by the powers, and they proposed to the French tribunals to render justice in the name of the Empress-Regent or in that of the allied sovereigns, which was perfectly absurd. So the French tribunals suspended their functions. These tribunals were sometimes wrong in anticipating, after a fashion, the German objections, since a judgment does not bring into play the chief of the state; the latter is only brought forward in the record prepared for enforcing a judgment, when the person who has been condemned has not submitted himself willingly to the decision of the tribunal, and it is always well to have a decision even if it cannot be immediately put into execution.

(b) JURISDICTION OF THE OCCUPANT.—An army carries with it its judicial powers which it exercises without difficulty by applying the ordinary law in all cases having relation to its internal affairs; but in addition, military jurisdiction extends to acts committed by civilians against the army, and this is natural. It is not possible, evidently, in such cases to have recourse to the local tribunals; on one side, the army of the occupant may have no confidence in them; on the other side, one cannot impose on these tribunals the punishment of their nationals for acts committed against the occupant.

The army of occupation thus protects itself by its own methods of justice against all acts directed against it, and vice versa, its jurisdiction, through courts-martial will take cognizance of acts committed by soldiers against the inhabitants. The jurisdiction of the occupant works under its own rules. But these rules are not always identical. Under our legislation, military commissions take cognizance of acts committed by the inhabitants against the occu-

pying soldiers, but they give to the inhabitants the same guaranties of procedure as to the members of the army. In 1870 the Germans did not apply such rules; an order of the King of Prussia, commanding the German armies, had fixed the penalties and the procedure to be applied in certain cases, and left to the military commanders the care of organizing the tribunal. The same order prescribed an immediate execution of judgments, which rendered appeals impossible; and, as a matter of fact, military chiefs organized justice arbitrarily. This method of doing things is certainly objectionable.

3. ECONOMIC AND ADMINISTRATIVE MEASURES WHICH THE OCCUPANT MAY TAKE.—These measures are very numerous. The occupant will regulate, among other things, the exchange of money, the service of the mails, the opening of schools, etc. But a question at once presents itself: will the local functionaries continue in their functions? Certain of them, as for example, those concerned with the finances, will have received instructions from their own government to leave the locality; as to the others, it will depend on the question of whether the exercise of their functions may be more useful to the inhabitants than to the enemy. There are, in all cases, certain services which will be maintained; municipal authorities, for example, will remain, both in the interests of the the inhabitants and in that of the enemy. For the former, as for the latter, it is necessary to have representatives who may be able to enter into arrangements with the military authorities. The mission of these representatives is always difficult and very delicate.

TAXES.—The right of the occupant in this matter is a result of his actual sovereignty; however, the occupant receives the taxes imposed for the benefit of the state, as a consequence of his obligation to

maintain order and social conditions in the occupied country. For him, therefore, there is not in this a pure benefit; it is obvious, nevertheless, that the occupant will occupy himself primarily with his own needs and his military requirements. Article 48, which governs in this matter, says:

“If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.”

The restriction, “as far as is possible,” being necessary because it may be affirmed that it will seldom be possible to conform to the system previously in force. The enemy will therefore be brought by approximation to determine a sum total which shall be an *equivalent* of the taxes. It was thus with the Germans in 1870; they knew approximately the allotment of the departmental contingents in regard to the direct taxes; in each department they divided this amount between the communes according to their population, and left to the mayors the care of assessing the communal contingent and of arranging for collection. They even offered a percentage to the mayors, but in the greater number of instances the latter refused them, with the result that the German treasury benefitted from these refusals, by sums which might have entered, by way of a refund, into the pockets of the French taxpayers.

The right recognized in the occupant to collect taxes is only applicable to taxes due the state, and from this point of view there is great interest in distinguishing private funds from public ones; since,

whereas the latter are a good prize, the first mentioned must be respected by the occupant.

**THE RIGHTS OF THE OCCUPANT IN THE MATTER OF INTERDICTIONS OR ORDERS GIVEN TO THE INHABITANTS.**—In the matter of inhibitions, the occupant has a general right over all the inhabitants, and this whatever may be their nationality; but it is not the same in regard to orders. The occupant may not order any act of hostility by the inhabitants against their lawful government, and he will endeavor to impose nothing upon them which is contrary to their patriotism.

Under the old regime, the occupant considered himself as a conqueror, and did not hesitate to raise troops in the occupied country. If this manner of doing things was not always contrary to the sentiments of the occupied country (wars of propaganda), it is none the less true that it was always against the law. Today such a measure would be patently unlawful, and no one dreams of requiring from the inhabitants active assistance. The rules of The Hague of 1899 already determined in Article 44, that:

“It is forbidden to compel the population of an occupied territory to take part in military operations against their own country.”

This question was taken up again in 1907 in regard to guides, with the result that the practice was condemned, in accordance with a thesis maintained by the French delegation and contrary to the Austro-Hungarian thesis which was very energetically sustained by the Russians. The French delegation showed that it was worthy of our time not to oblige inhabitants to serve as guides for the enemy; and that there was a peculiar contradiction in forbidding them to serve in the enemy's army and yet in permitting them to serve as guides against their own country; would not the harm done to his country by



the inhabitant who guides the enemy be greater than that which he might cause it by simply incorporating himself in the enemy's army? This thesis won out, and the new article 44 says:

"A belligerent is forbidden to force the inhabitants of a territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense."

From this it may be said that *a fortiori* it is forbidden to the inhabitants to guide the enemy. Germany, Austria, Russia, Japan, Bulgaria, Roumania and Montenegro made reservations in regard to the article. It will follow that in case of a war with any of these nations, the nations who agreed to Article 44 would not be bound by it, and might, in the territory of the state which did not accept the article, force the inhabitants to serve as guides.

There exists, besides, another practice contrary to the respect due the inhabitants of occupied territory, which was employed in an objectionable manner in 1870. It is that of taking hostages. It was a practice in full force in other days. One counted but little on a parole given, and hostages were taken who would be responsible for the execution of engagements. In 1870 the Germans revived this practice, better still, they took hostages by way of reprisals (40 hostages were taken at Dijon and sent to Berlin because the French government did not wish to release a German sea captain who had been made prisoner). Certain German jurisconsults were unable to conceal their reprobation of such acts.

### Effects of War on Property

The occupant is in contact with the property of the state and with that of private persons of the adverse belligerent.

If, in the days of the Romans, the property of the enemy was *res nullius* and at the mercy of the adversary, a conquest being the most legitimate method of acquisition, things are very different today.

Just as modern ideas do not admit that one should do harm for the sake of harm, so they demand that in principle property be respected. In Article 23g and 25 of the rules of The Hague, allusion is made to the methods of destruction which are only justified if the necessities of war imperiously demand them. It seems, however, that one should establish a distinction between the property of the state and that of private persons, also between real and personal property.

### Property of the State

REAL PROPERTY.—The invader occupies, but does not acquire, territory so long as there has been no cession. He exercises therein, however, a considerable power which permits him to destroy everything which may imperil his security or interfere with his defense (Art. 23g of The Hague rules). He may in the same way, utilize existing edifices to establish his offices, etc.; but logically he may not make material changes in the buildings other than those *necessary* for such purposes.

The occupant has also the enjoyment of the works of the state ("exploitations") which may produce revenues for him; but Article 55 of The Hague rules prescribes that he shall administer such works so as to protect their capital, having regard to the rules of usufruct. The rights of an occupant in regard to these things ceases, at the same time as does the occupation, and all business agreements which are contrary to these principles become abrogated and are without value from that moment.

In 1870 the Germans had sold from the French public domain near Nancy, 15,000 oak trees to a banker at a ridiculously low price. The sale clearly went beyond the limits of honest administration and cut into the principal. The execution of the contract was following its course and already about 9,000 trees had been cut down, when the occupation ceased. The German who had bought the trees, not daring to continue to exploit them, disposed of his bargain which, from hand to hand, reached those of a Frenchman who refused to pay the purchase price and asked the court of Nancy to pronounce an abrogation, which was done by a decree of August 3, 1872, for the reason that the sale related to the property of a third party. The German who had lost turned to his government and asked it to intervene. The German government did not do so, thus approving the action of the French tribunal, which considered the transaction as having gone beyond the limits of proper administration.

**POLICY OF THE OCCUPANT IN OCCUPIED TERRITORY.**—The occupant should cause the social life of the country to be taken up; he should reopen the schools, the places of worship, should assure the services of transportation, of the mails, etc. The occupant should also remember that municipal authority, which is about the only old authority that will remain, is a force which he must not neglect. The question is a most delicate one so far as concerns the view which may be taken by the municipal authorities in regard to the occupant. To what extent may the municipal authorities serve as an intermediary between the occupant and the inhabitants? Should they remain or resign? These are questions of fact which cannot be determined except by the application of a general principle: the municipal authorities should serve the occupant *against their country* in nothing,

and yet serve, as much as possible, their own citizens.

**PERSONAL PROPERTY.**—In regard to personal property the rule is not so simple as in regard to realty, and there are distinctions to be made according to whether the personal property may or may not serve in the operations of war. This principle is established by Article 53 of the rules of The Hague of 1907, paragraph 1:

“An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.”

It has therefore been recognized that all objects of personality belonging to the State which may be useful in the operations of war are a good prize; the end of the paragraph gives the general idea. The enumeration which precedes it is merely an application thereof.

In this article the expression “an army of occupation” is taken in a broad sense; we might reflect upon this Sec. III of the rules for having used the word “occupied” in various senses; sometimes the word “occupation” is employed in opposition to the word “invasion.” For example, when it has reference to legislation which should be respected, unless there be an absolute bar thereto (Art. 43), and in regard to the taxes, which may be raised (Art. 48). Here (Art. 53), on the contrary, the word occupation has a broad meaning; if by a simple invasion, or even by a cavalry raid, one succeeds in putting ones hands on stores or on a public treasure, these objects are all good prize without there having to be, properly speaking, an occupation. One must include as objects of good prize, stores, munitions of war, and also the

money which is found in the public coffers; this is why Article 53 speaks of "cash." From this point of view there is an interest in distinguishing public coffers from private ones.

During the war of 1870 the Germans found in several of the cities which they occupied, branches of the Bank of France containing large sums of money. At first the occupants were in doubt as to their rights, believing the bank to be a government institution. When it was shown that this was not so, even though the bank had a close relation to the government, the funds were respected.

The coffers of communes\* or those of private societies or of public societies, should be respected. All that can be done is to place them under sequestration, and this is perfectly legitimate in order to prevent such funds from being loaned to the enemy state.

The principle in relation to this was very well shown in 1874 at the Brussels Conference by the leading German delegate, who drew a distinction in the funds which might be found in the coffers of the state, between those which belonged to the state, and those which belonged to communes or societies, or to private persons. In regard to all these funds there is a presumption that they belong to the state and they are a good capture, but if later proof can be made that a part of the funds did not properly belong to the state, this part should be returned in virtue of the principle of the respect due to private property.

In Article 53 "realizable securities which are strictly the property of the state" are mentioned. This relates to the case where the state whose territory has been invaded should be the creditor of collectible debts. Then the belligerent who invades the

---

\*Communes are political subdivisions somewhat similar to our townships. As used in these lectures, the term includes all forms of municipal units.

territory has the right to cause himself to be paid in place of the state which is the true creditor, but from the moment that this right is recognized in the invader it must necessarily follow that the debtor who has paid his debt to the invader is freed from further payment to the legal sovereign whom he had originally engaged himself to pay; it would clearly be unfair that he should be obliged to pay a second time to the legal sovereign what he has already paid to the invader under the influence of constraint. This is a situation identical with that which is presented in regard to the payment of taxes.

We must not confound these rules of international law with the rules that may be followed in the case of domestic disturbances. Let us suppose that an insurrection has assumed proportions which render the legal sovereign temporarily powerless in the locality affected, and that the insurgents within that locality require a government depository to turn over to them certain public funds. It is not at all certain that a receipt taken by the depository would serve to satisfy the legal government for the loss of the funds, after order shall have been restored. The following may serve as an example:

During the Commune,\* the Bank of France was forced to pay to the insurgent government sums amounting to eight or nine million francs, and it was thanks to the protection afforded by a member of that government who had been charged with guarding the bank (Beslay), and who acted in this case with great honesty, that the requirements did not rise to a much greater amount. After the troubles, the Bank of France asked of the state a restitution of these sums, but the bank finally had to bear the loss of that which it had been obliged to pay.

---

\*The name given to an insurrection which broke out in the city of Paris in March, 1871.

From what has been shown it is apparent that today the law has much more respect for enemy property than had the law at the opening of the XIX Century. Then almost all property was a good prize; today practically everything which does not come within the general idea of being useful for war purposes, is to be respected.

This view receives a very important application in that which concerns works of art, pictures, statues, books and manuscripts; respect for these objects results not only from their exclusion from the enumeration of Article 53, but also and more particularly from what is said in Article 56.

“The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

“All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”

From the combination of Articles 53 and 55, there flows again very clearly the idea, which may be called modern, of the respect due to all personal property belonging to the state which is not susceptible of use in time of war.

It is certain that this idea has not always existed and that during the wars of the Revolution and of the Empire, in particular, there were acts contrary thereto. But there was also, in relation to this, much confusion; Napoleon I had the idea of making Paris the great intellectual center of the world, and he tried to assemble there works of art taken from all the museums of Europe, but the methods employed to realize this concentration were not always the same: often, undoubtedly, there was the brutal right of conquest, and commissioners were charged with

the duty of determining what objects it would be well to abstract from the museums and public monuments of an invaded country, and send to Paris; but it also frequently happened that works of art were delivered to the French authorities by virtue of treaties; it is thus that the Pope, by the treaty of Tolentino, ceded to France, as an indemnity, certain works of art. This convention is quite as regular as would be one providing for an indemnity in money or a cession of territory, and often the conquered power will voluntarily cede works of art rather than pay a war indemnity, because to do so lays a less charge on the people.

When the coalition triumphed over France in 1814, there was nothing said in regard to these objects of art in the treaties which were then concluded, and Louis XVIII could say, on June 4, 1814, in a speech to the Chamber of Deputies, that the works of art acquired during the wars of the Empire belonged to France by a more stable right than that which resulted from the right of war; however, it was decided to return to their owners certain objects of art, and several grandees of Spain, who had been the victims of imposition, reentered into possession of their works of art. But after the "Cent jours" a species of exasperation set in, both from the interior and the exterior, and the methods of the second Restoration were entirely different; in the suspension of arms signed at St. Cloud on July 3, 1815, it was recognized that France had to submit to the return of the greater number of the objects of art brought to Paris, without a distinction being drawn between those which had been brought there as the results of treaties, and those which had been taken by force; it was the King of Holland who first proposed to Wellington that he cause this right to be recognized and at the instance of the English government, which was the most dis-



interested in the matter, commissioners of England and Holland, and those of a certain number of other states, came and removed from the French museums the works of art which had been placed in them; there were returned thus more than 1500 manuscripts, 2065 pictures, 287 bronzes, 1199 enamels, etc.

During the course of the XIX Century, at least in European wars, these practices had been abandoned; but in the extra-European wars it would seem that the same rule has not always been observed, even when Europeans have figured as belligerents. It is thus that in 1860 there took place the methodical pillage of the summer palace of the Emperor of China; one saw there official commissioners determining what should be offered to Queen Victoria and to the Emperor Napoleon III, and what should be sold for the benefit of the troops, and one may see at Fontainebleau, in the Chinese Museum, a necklace which was then offered to the Empress Eugénie.

In the same way, in 1879-80, in the war of the Pacific, between Peru and Bolivia on one side, and Chile on the other, the museums and libraries of Lima were largely placed under contribution by the Chileans, and a great number of statues and objects of art were landed at Valparaiso.

Today ideas on this point have changed, and the German manual, published by the Great General Staff, recognizes this fact in a very peculiar way, it may be said, since, after having spoken of the possible appropriation of objects which may serve in war, the manual recommends that the property of trades schools and other public establishments be respected, and adds that the ancient *custom* of appropriating to oneself such property seems to be disappearing. The articles of the German and French press in regard to objects of art carried away during the Chinese campaign show how much public opinion has

become ticklish and even sentimental on this point.

So far as regards the sanitary matériel, the situation is regulated by Article 4 of the Geneva Convention of 1864.

“As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as their private property.”

And by Article 15 of the convention as revised in 1906:

“Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but cannot be diverted from their use so long as they are necessary for the sick and wounded.”

This matériel is, therefore, a good prize, but it has a particular objective and cannot be detoured from that objective. In regard to the matériel belonging to aid societies, Article 16 specifies that it must be “regarded as private property and as such will be respected under all circumstances.” We have reference of course here to the matériel of fixed establishments, as we have already considered the case of mobile formations.

From all this it follows that today, in war on land, there are objects of personality belonging to the enemy state which are a good capture. These objects, such as stores, provisions, funds, may have a certain importance; the question then presents itself of knowing to whom these prizes belong.

War being a relation of state to state, the prizes naturally belong to the state to which the troops pertain that made the capture. But the state may decide the use to which it will put these prizes; this is a question entirely of domestic order and no longer a question of international regulation.

From the standpoint of the United States but little need be said in regard to this as our regulations

consider all property captured in which ownership may be taken, as the property of the government. No recognition is given to the individual who may first secure the prize. Any soldier who captures property, which may properly be seized, has for his duty to turn it in, and neither he nor the organization to which he belongs may benefit therefrom. With foreign states the rule in many cases is different and in view of the questions in regard to "loot sales" and kindred methods of disposing of captured movables which were presented to our army by the actions of other contingents during the recent Peking expedition, it may be well to consider the views held by certain foreign armies in regard to the disposition of prizes taken by troops on land. In the next lecture we will therefore consider this question.

It must be observed again that whatever is a lawful prize in war on land is the prize of the government whose army has taken it and it is for that government to dispose of it as it sees fit.

It may be well here to draw the distinction between "booty" and "pillage." The term "booty" applies to things which are gathered by a collective movement, whereas "pillage" is the result of individual acts.



## ELEVENTH LECTURE

---

THE French regulations embodied, until 1901, a principle which had been admitted for several centuries and which is set forth as Article 109 of the Regulations of 1895; it reads as follows:

“All prizes made by detachments belong to them, when it is recognized that they are only made up of objects taken from the enemy.”

The regulations then determine how the prizes are to be valued and sold by the subintendant of headquarters, and the number of parts to be allotted to each member of the detachment according to his grade. This disposition of prizes will be found in the regulations running back to the beginning of the XVIII century. If in principle prizes were a benefit to the State, it was thought that they should be made of particular advantage to the detachments which had made them, thus encouraging, in that sense, a war of partisans.

At the time of the expedition to China in 1900, there were, on the part of the anti-militarists, very sharp attacks against the prizes which were made. The Germans and French had seized certain articles found in Peking—early bronzes going back to the time of Louis XIV—of some artistic value. These articles were taken and sent to Europe. But in France a movement of public opinion became evident and the articles were returned to China; this action was entirely correct from every point of view; if we suppose that the articles were a good prize—a point which is disputable—they belonged to the state; the state returned them; it had the strict right to do so.

But the situation was different in regard to the prizes which were made and divided under the provisions of Article 109 of the regulations; there had been a division; payments had been made to those interested; yet the officers and men were forced to restore the amounts which they had received or the cheques which represented these amounts, an action, which, in the eyes of public opinion, placed in the light of reprehensible pillage that which had been done in conformity with existing regulations. This was very objectionable, and it may be said that on this occasion the army was defended with an extreme lack of vigor. However this may be, the decree of June 26, 1906, has decided that Article 109 is abrogated; this is perfectly proper, and the present rule of action which awards to the state alone the benefit of prizes is more in accord with modern ideas.

If the suppression of Article 109 of the French regulations must be approved as being in conformity with the idea that war should never be a question of lucre, it must be recognized that there is an incoherence in the present general situation, and that if logic is to rule there is another thing to be done.

In maritime war there are still profits which may be made by the military; it is accepted that private vessels of the enemy nation are a good prize and that war vessels of a belligerent may capture commercial vessels flying the enemy's flag. It is also admitted that what is known as prize money accrues to the crew of the capturing vessel; there is here, therefore, a pure and simple profit which is made by the officers and sailors—no longer a capture of property belonging to the enemy state, but a prize taken from enemy private property. The danger incurred in such a capture is not greater than in the case of a land capture; it is even less; it is thus

illogical to maintain by international law this method of action.

There are at present but two navies in the world in which prize money is not recognized; first, that of Japan in which it has never been recognized; second, that of the United States, which for a long time recognized it as do the navies of other nations. An act of 1899 suppressed it for our navy and this date is held by some foreign critics to be rather significant for the following alleged reason: it was a date following the Spanish-American war, and the law was enacted because the American government had learned by experience that there were inconveniences in relation to naval officers having a personal interest in operations with which they might be charged. A prize may involve not only enemy commercial vessels but neutral commercial vessels against which a violation of neutrality is charged, and then—the feebleness of human nature helping—one may be led to believe, with too much ease, that a vessel violates neutrality, when one knows that one may profit thereby. This happened in regard to a French packet which was seized by a United States cruiser on the pretext that it had tried to force a blockade.

The claim was unjust and the judgment of the lower court declared the capture unjustified; it was necessary, however, to appeal the case, and finally the vessel was released but without indemnity; as surprise was expressed that an appeal was taken from a decision favorable to the alleged prize, the United States government explained that there had been pressure on the part of the Navy; the crew of the American cruiser protested energetically as they watched the disappearance of the windfall on which they had counted.

The foregoing is merely illustrative of views held in Europe in regard to the subject matter. It is

perfectly well established, that the United States has long advocated the policy of free private goods at sea. As far back as the Declaration of Paris, when privateering was abolished, by the great powers of Europe, the United States, while it did not feel that it could afford to forego the advantage of privateering so long as the practice was of any use, was willing to agree to the doctrine that all private property, not contraband, should be free from capture. This as we have already seen would have stopped privateering from the lack of incentive. This view would indicate that in the matter of prize money, the United States has long been prepared to take its present stand.

There is no sound reason why two rules should obtain and that private property on land should be respected while private property at sea may be captured. The right of capture should in all cases be considered as an act between state and state and all idea of lucre or of speculation should disappear.

### Private Property

If the new ideas of war have brought about a change in the view to be taken in regard to the property of the state, and determine that all property of the state, even though it be personal property, is not a good prize, still more strongly must these ideas have influenced the principles applied to private property. Here, the opinion which has finally won out is that *in war on land, private property should be respected.*

As a matter of fact, this rule would be ridiculous if it were taken by the letter; it is certain that even the smallest operations of war carry with them consequences often disastrous to private property; a fight, even a march, will always bring destruction



and even devastation by the force of circumstances. The rule means simply two things:

(1) That international law proscribes unnecessary destruction; and that one must not destroy for the sole purpose of destroying; this is stated in Article 23-g of The Hague rules, which holds that it is forbidden:

“To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

(2) That international law proscribes what was known in other days as booty and pillage. Article 46, in its second paragraph, states that: “private property cannot be confiscated,” and Article 28 states that: “the pillage of a town or place, even when taken by assault, is prohibited.”

It is this inhibition against appropriating, purely and simply, private property, which gives so much importance to the distinction which we have drawn between public and private funds. A consequence of the principle is that if we suppose one of the belligerent states to be the debtor of the subjects of the adversary, it may not avoid meeting its engagements; this question presents itself in regard to public bonds standing in the name of an enemy subject; the non-payment of interest would be a direct blow at private property. And here the reputation of the belligerent guarantees his obligation, since he has every incentive to safeguard his own credit.

It is in England that there has been preserved—at least in the form in which it is expressed in the books—the absolute holding of the ancient law on this point; English authors still commonly maintain today that as the result of a war there are no longer any ties of law between a state and the subjects of the adversary, thus it has been said that an enemy subject may not move in a matter of justice, before the tri-

bunals of the adversary, that his rights are at least suspended. This might have been applicable in other days, when the relations between different countries were not very close; but today, by reason of the interweaving of interests, it has become impossible; if we should suppose, for instance, a war between England and Germany—it is clear that a state of war may not serve, in itself, to prevent the large number of German subjects who are creditors of English subjects from appearing before the English tribunals, since this would be equivalent to taking from them the right to cause themselves to be paid.

At The Hague conference of 1907, the German delegate proposed an amendment in regard to this, which was accepted without difficulty and has been incorporated into Article 23 as Sec. h, which forbids:

“To declare abolished, suspended, or inadmissible in a court of law, the rights and actions of the nationals of the hostile party.”

This has reference to the English doctrine we have just mentioned, and is entirely justified; such questions, when they can be discussed, are settled without difficulty. But the place in which we find this amendment is rather odd; it is contained in an article which has for its object to indicate to the different states the instructions which they are to give to their troops; and the paragraph has certainly nothing to do with the conduct of armies in campaign.

It results, from the principle of the respect due to private property, that acts of pillage, theft, marauding done by soldiers in invaded or occupied territory, are acts of brigandage which are covered by a number of laws, and that these laws should be applied in an enemy country as well as at home.

This is not only just, but also useful, and the interests of the inhabitants of the invaded country coincides here with those of the invader. On the one

hand, the interdiction of pillage is of assistance to the discipline and order of the army; on the other, if troops give way to pillage, the population is usually led to a condition of exasperation, and the security of the army is by so much diminished. It may be remembered, in regard to this, that Napoleon, in criticizing the conduct of his lieutenants in Spain, said that the guerrillas had not appeared until a year after his departure, and then thanks to the pillage of which the marshals themselves gave the example, and he rendered honor to Suchet, who, by giving an example of severe discipline, was never the aim of guerrillas. In the same way one cause of the loss of the battle of Rosbach was that from 6,000 to 7,000 soldiers were absent at the time of the fight, because they were marauding.

The Germans, while recognizing the principle of the respect for private property, wished to have it admitted that in certain cases incidents of pillage or of destruction might explain, or even justify, themselves. Notably, in regard to the pillage or destruction of houses "wildly abandoned" by their owners; this is set forth in the manual published by the German Great General Staff; under this theory, owners who abandon their houses can only blame themselves for what may happen in their absence.

This is rather severe, because it may happen that that which is called an abandoning of property, can as a matter of fact be explained. There are certain houses which are only inhabited during part of the year, and the absence of the owners does not necessarily indicate that there has been an abandoning by them.

It is well settled, however, that an owner may not escape from the burthen of invasion and of occupation by merely closing his house; if an owner is to have troops quartered upon him and his house is found

closed, nothing forbids breaking in the door and taking the quarters, but this does not include the right to carry off the owner's clock when the troops move.

Certain authors, while admitting the respect due to private property, make an exception in regard to goods which belong to the combatants and are of the opinion that one may properly take that which the combatants have on their persons, and that it is permissible to despoil the dead and wounded. This is evidently contrary to modern ideas. In the rules of The Hague they did not take the trouble to speak for combatants in general, but when prisoners, who are special combatants, were considered, it was said, in paragraph 3 of Article 4:

"All their personal belongings, except arms, horses and military papers, remain their property."

If that which is found upon a prisoner must be respected, it would seem that one should hold the same view in regard to that which is found on a corpse, whether it be one who has died on the field of battle or one who has died in the hospital; it is exactly the same idea, and this is set forth in the second paragraph of Article 14 of The Hague rules.

These requirements of Articles 4 and 14 clearly establish that the private property, and any objects belonging to the combatants, must be respected, and as a matter of fact, during the Russo-Japanese war many of the objects found by the Japanese on the bodies of dead Russians, particularly pocket-books, were transmitted to the Russian government through the medium of the French government.

**DIFFERENCES BETWEEN WAR AT SEA AND WAR ON LAND IN REGARD TO PRIVATE PROPERTY.**—From what precedes, there results a very essential difference between the procedure of war on land and that of war at sea; private property in war on land may not be the object of confiscation, properly speaking;

whereas, *in war at sea private enemy property is a good prize*; one may confiscate at the same time a vessel flying the enemy flag and its cargo.

Should this very remarkable difference between war on land and war at sea be maintained? The question has been mooted for a long time, and it was the subject of a very extended discussion at The Hague in 1907.

From the standpoint of general principles, it has been said that the principle of respect of private property being a result of the modern idea of war, there is no reason why it should not be made to apply to war at sea. And the greater number of authors, particularly in France, are of the opinion that there is here a traditional difference which is without justification.

However, it does not seem that the thing is as simple as it appears at first, and in regard to the principle there may appear a question.

In war on land, a respect for private property is imposed by the interests of the belligerent as much as by the interest of the inhabitants, and this respect agrees well with the nature of the coercion which the belligerent exercises over his adversary. This coercion results from the very occupation of the territory, and the invader or occupant may reap a certain profit from the occupation or from the invasion while still respecting private property; he makes notable profits, for example, by means of requisitions and impositions.

In war at sea the situation is entirely different. Here it may be that there is no method of coercion against ones adversary unless one ruins his commerce, if, for example, the adversary power has no vessels of war. Besides, the seizure of commercial vessels does not entail the deplorable consequences for industry, which pillage in war on land entails; in

the latter case, certain individual disasters result which may be irreparable. In maritime war, on the contrary, commerce is undertaken by big capital; vessels as a rule do not belong to private individuals, who would be ruined if their vessels were captured; the loss is spread out over a large number of shareholders, and it is a loss which takes on a national rather than an individual character.

Thus, there is here a method of constraint directed at the enemy state, and therefore there is not, as a matter of fact, a similarity between maritime war and war on land; for this reason an identical rule is not required.

There are, however, countries which are traditionally in favor of the respect of private property in war at sea; first, the small states, then the United States, by which it has long been advocated; in 1856 the United States had subordinated its approval of the Declaration of Paris to the acceptance of the doctrine of respect for private property, and at that time the rule would have been adopted but for the opposition of England; France had decided to accept it.

Since that date the United States had again taken up the question, and submitted it to The Hague Conference of 1907. The situation by then had slightly changed; until these last years, to uphold the right of prize was a real dogma in England; but for some time an evolution has been in progress in that country, with the result that there was doubt up to the last moment as to what would be the opinion of England on the question.

The reasons for this change of attitude are the following: England is the country which has the most powerful navy in the world, but its commercial navy is no less important, and it is for England a vital question to see that its commercial relations

are maintained in case of war. England, in fact, is not sufficient to itself in regard to the objects of first necessity, and imports from abroad a large proportion of its food supplies; it thus has the fear that notwithstanding all the strength of its war fleet, an adversary might do it a great deal of harm by capturing its merchant vessels.

However, at The Hague the English government fought the American proposition, which, nevertheless, was carried by twenty-five votes—a heavy majority. But Holland, France and Germany having voted against it, things remained as they were and the matter was not pushed further. There is, nevertheless, a tendency, which has become accentuated, to accept the principle; it was not sufficient for the powers in opposition to the American motion to say simply that they asked for the *status quo*; they were required to justify their attitude. In so far as regards France in particular, the existing practice is contrary to the current of public opinion, which may become irresistible. And if there should be a third Peace Conference, one may ask if the American proposition will not be carried unanimously.

To render the present system entirely equitable, it would be necessary to make two reforms:

- (1) Suppress prize money.

- (2) Admit that the losses, resulting from the right of capture, should not be borne by the individual, but by the nation. It is, in fact, as the result of the right of coercion of one state towards another that captures are made; it should be necessary, therefore, that the state whose ships have been captured, indemnify its nationals. However this may be, it would seem that the actual positive law in this matter may no longer be successfully maintained without being softened or qualified.

### Requisitions and Contributions

Requisitions and contributions are the restrictions placed on the principle of respect for private property.

*Two kinds of prestation may be required: in kind; in money.*

The phraseology in this matter is not clearly defined. There are two things to be distinguished: a requisition, a contribution. We will designate by the word *requisitions* prestations in kind, while we will reserve the term *contributions* to prestations in money. This is, it may be said, what was accepted at The Hague, but in official language there is still sometimes a confusion between the two words.

A requisition is an act of constraint exercised upon the inhabitants in order to obtain from them either personal services or things necessary for the needs of the army.

When personal services are requisitioned, account must be taken of the duty which the requisitioned individual has towards his legal sovereign, and he must not be forced to commit acts of treason against his country.

In particular, in regard to the requisitioning of guides, Article 44 says:

“A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.”

It results, from this article that one may not force an inhabitant to serve as a guide, because a guide is a walking source of information, who may as such cause very much greater harm to his country than if he fought as a soldier in the ranks of the enemy army.

Certain powers, however, registered reservations (Germany, Austria, Russia, Japan, Montenegro, Bul-



garia and Roumania), declaring it their wish not to renounce the right to constrain the inhabitants to serve as guides. Naturally, if they are not bound to us, we are not bound to them. The clause does not exist in our mutual relations.

**REQUISITION OF THINGS.**—As has already been stated, the requisition of things constitutes an attack on the respect for private property. It has even been said that in fact requisitioning is organized pillage. Without doubt certain abuses carry with them a lack of recognition of the respect for private property, but notwithstanding this, the present practice is better than the ancient system of pillage, because order is always better than disorder.

Requisitions are exercised either in national or in enemy territory.

In national territory they are exercised by virtue of the sovereignty of the state; even in time of peace they might be necessary in the case of the assemblage of troops. A requisition always carries with it the right to an indemnity. Even where the right of requisition is a domestic right, it is applicable to strangers who reside within the territory covered, who may not even object to having troops billeted upon them. The right to billet troops is based on the right of requisition. In regard to this, however, in the United States, we have the Third amendment of the Constitution, which reads as follows:

“No soldier shall, in time of peace, be quartered in any home, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

It is also to be remembered that the Fifth amendment closes as follows:

“Nor shall private property be taken for public use without just compensation.”

In enemy territory requisition must rest on different principles. It has been said that there could not be a right of requisition in enemy territory; yet the army is obliged to nourish as well as to protect itself, and its right of requisition is generally admitted and recognized. This right may be applied as well to the case of invasion as to that of occupation. It is thus that we must understand the word occupation in Article 52 of The Hague rules. It is certain that requisitions are more likely to be necessary in an invaded than in an occupied country, since in the latter case, the service of supply works with greater ease.

LIMITS TO THE RIGHT OF REQUISITION. — May one bring restrictions to bear on the right of requisition in enemy territory? This was very much discussed at the Brussels conference of 1874 and at The Hague in 1899. In 1874 two opposing systems were brought face to face.

1. A requisition is exercised by virtue of actual sovereignty, which belongs to the occupant and which gives him the right to collect the taxes imposed by the legal sovereign; but the occupant may insist upon this right only within the measure which the legal sovereign himself would require. The objection to this system is that the enemy is thrown back to the rules of his adversary, with which he may not be acquainted or which may be defective.

2. The occupant will exercise the right of requisition in enemy country as he would exercise it at home. This is a good system, since the army will know the rules it is to apply; and besides, recrimination will be obviated, because there is no reason for not applying to the enemy that which might be applied to ones nationals. Besides it will not be possible to requisition the inhabitants of occupied territory, to co-operate in operations of war against

their own country. Article 52 of the rules of The Hague confines itself to saying:

“Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country\*\*\*.”

One can see that from this article there flow three restrictions on the right of requisition. It must:

(1) Only extend to the satisfying of the needs of the army;

(2) Not to be for the army a method of enriching itself (which excludes the requisitioning of objects of luxury);

(3) Be in proportion to the resources of the country.

These restrictions do not forbid the application of the domestic rule; they reconcile themselves very well to it, and even afford a guaranty for the occupied country.

What has been said is based on the idea which obtains among the military nations of Europe, where even in time of peace supplies may be requisitioned for the armies, and where in time of war the support of the armies is the prime factor in the national life.

With us in practice it is different and within our own territory neither in time of peace nor in time of war is it expected that the army shall be supplied except by purchase in the ordinary way of business. In theory there can be no doubt, however, of the right of the nation to maintain its life by the use of requisitions, should it be necessary to do so, subject to the constitutional requirement that private property shall not be taken for public use without just compensation. This very requirement of the constitution indicates that private property may be taken for public use. The normal application of the constitu-

tional provision, is to property taken under the right of Eminent Domain. This Cooley defines as follows:

“The lawful authority which exists in any sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the safety, necessity, convenience or welfare may demand.”

Cooley, however, takes the view that the right of eminent domain demands for its fulfillment legislative preparation and he makes no allowance for the exercise of the right of domestic requisition under what we may call a state of martial law or an emergency. Willoughby, however, holds that:

“Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands.”

That this public necessity may be a war necessity is clearly accepted by the Supreme Court as is shown by the cases of *Mitchell vs. Harmony*, 13 Howard; and *United States vs. Russell*, 13 Wallace. To warrant the taking, the necessity must be immediate. If there be time and opportunity, the supplies should be contracted for in the usual way. If time and opportunity for a free contract be lacking, the supplies may be seized, subject to future compensation.

Our Field Service Regulations contain the requirement, that supplies in our own country or in that of an ally be obtained by purchase and provide for the method of making requisitions in a hostile territory. When possible, it is undoubtedly best to levy requisitions through the political chiefs of the hostile community as by this method the requirements of The Hague convention are most likely to be observed.

We cannot be guided by any domestic rule since none obtains in the United States, and should such a

rule ever be established it will be formulated when the emergency arises.

**RIGHT OF REQUISITION—AUTHORITIES TO WHOM REQUISITIONS SHOULD BE ADDRESSED.**—The law determines with care the authorities who may exercise the right of requisition. This right belongs to the military (the local commanding officer) who may of course delegate it to the functionaries of the supply corps. In order to avoid abuses, this right of requisition should not be exercised by an authority of too low a grade, *a fortiori*, not by private soldiers. It is only in very exceptional cases that a requisition should be addressed directly to the inhabitants. The importance of municipalities in matters of requisition is easily understood; they can give every guaranty for the just division of the charges imposed by the order of requisition, and at the same time insure their prompt execution.

**FORMS IN WHICH THE RIGHT OF REQUISITION MUST BE EXERCISED—ORDER OF REQUISITION—RECEIPT.**—Every requisition should be in writing. The writer of the requisition should hand over an order of requisition taken out of a stubbook, and give a receipt on which he will place sufficient notations to indicate the conditions under which the requisition was furnished.

In regard to the details connected with the levying of requisitions, our field service regulations, and the blank forms which have been prepared, will give us the required data. So far as I have seen these forms, they are prepared mainly with a view of dealing directly with individuals, and seem to indicate the idea that the occupant will either seize, directly, the property of individuals by a foraging force or will call upon the people of the district to bring in the required articles and receive pay for them. It is true,

however, that the field service regulations say that if practicable, aid of civil authorities will be had.

As has been already said, modern conditions would demand that requisitions be made, if possible, through the local enemy authorities, leaving it to the latter to make the assessments with a knowledge of the capacity of the individuals of their community. If time and duties will permit, probably the most satisfactory way of conducting the business would be to call on the authorities for the needed supplies, and then, when they are delivered, to pay the individuals concerned, or give receipts, or both, in the presence of some official of the locality.

It has been suggested that it is unnecessary to deliver an order of requisition in the case where the requisition is followed by payment for the articles requisitioned. This is an error, since, if the inhabitant has no proof to show, a new requisition might be required of him, and, besides, he may be accused by his own nationals of having entered into dealings with the enemy. (This case actually presented itself in 1870.) The requisitioning authority, therefore, is morally bound to deliver an order of requisition so that a population may justify the constraint which has been placed upon it.

Our Field Service Regulations are silent on this point and make no requirement that the requisition shall be in writing. It would seem preferable that this method be employed when possible, either by distributing copies of the order directing the requisition, translated into the local tongue, or by memoranda, given to individuals, enumerating the supplies, and the quantities thereof, which they are to furnish. There can then be no recrimination as to the amount to be delivered. The last course becomes, of course, unnecessary when the requisitions are called for through the officers of the locality.

General Orders 100, in par. 38, holds that: "Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity for the support or other benefit of the Army of the United States.

"If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity."

The principle set forth in the last paragraph in regard to a receipt appears in The Hague Convention of 1899 and is retained in that of 1907 (Art. 52) as follows:

"Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given \* \* \*"

It may also be asked if the requisition, when paid for and liquidated immediately, should be accompanied by a receipt. The requirement of the rules of The Hague which we have just cited seems to decide this in the negative. However, as already stated, it would seem proper that a receipt be given, in order to safeguard the responsibility of the inhabitant who fills the requisition, to permit him to prove later to the authorities of his country that he had been forced by the requisition to furnish to the enemy that which had been asked of him, and so to avoid future complications.

Requisitions made in national territory always give the right to an indemnity (Art. V of the Constitution). But this is an affair of interior economy.

If the requisition is made in enemy territory, it is an international affair.

The Hague rules of 1899 stated that the prestations should be as much as possible paid for in cash; otherwise they should be evidenced by receipts. Cash payments are very useful, and it has often been observed that in certain places where requisitions had produced nothing, the announcement of cash

payments caused an influx of provisions. In regard to settling for requisitions, in other days it was a question to be determined between the belligerent states in the treaties of peace which they made, and the indemnity was adjusted between the home state and the communes or the individuals who had been subjected to requisition.

There was, therefore, no obligation on the belligerent who had delivered receipts to reimburse for the requisitions made.

In 1907 a small but genuine revolution was operated in this matter, and this without any noise. For there were added these few words to Article 52, above cited :

“And the payment of the amount due shall be made as soon as possible.”

Here was a fundamental change. It is now determined that there is to be given a receipt which evidences a debt due by the belligerent who has made a requisition, and that this debt should be settled as soon as possible. This is an international agreement. Undoubtedly the conqueror will include in the amount which he will claim as a war indemnity the sums thus paid out, but it was thought, as a practical fact, that the owners of the property requisitioned were particularly to be considered, and should be indemnified earlier than in times gone by. We must take into account, however, the good will of the belligerent ; if he does not execute the provision of Article 52 there exists no means of coercing him. But he can not be indifferent to the fact that this proviso was enacted ; and there is here a true obligation which may be enforced, if need be, under Article 3 :

“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.”

AUTHORITY CREATED BY THE LAW AND REGULA-



TIONS. — The prescriptions of law in regard to requisitions are laid down very positively. These bear on two points :

(1) Limitation on the right of requisition.

(2) Penalty incurred by the party on whom requisition is made and who refuses to conform thereto.

There may be an abuse, or an exceeding, of authority ; there is an abuse when a competent authority exercises the right of requisition without conforming to the laws of war ; there is an exceeding of authority if a military person has not the necessary rank which will authorize him to exercise the right of requisition.

Where the right of requisition is improperly exercised, the punishment of the officer or man who is responsible will be in accordance with the laws of his own country.

In the United States army if an officer or an enlisted man should undertake to levy requisitions without proper authority he would be tried by court-martial under an appropriate article of war, dependent on the facts of the case.

Should the authorities of an occupied territory who have been called upon for a requisition, or an individual upon whom a similar call has been made, refuse to honor it, they may be tried by a military commission, the charges being framed to suit the case. It will be observed that the refusal to produce the supplies (where it can be done) is today a violation both of international law and of our domestic law since we have adhered to the convention.

What has been said, however, must be understood as referring only to the case where our adversary is also a signer of The Hague Convention ; otherwise questions of requisition are merely determined by the custom which we may choose to observe, and by our own regulations.

Should the penal rights above mentioned be exercised?

Yes, since an authority over the inhabitants is very necessary in enemy territory, because of the natural resistance which the enemy will offer. On the other hand, the discipline of the army itself will require it wherever the army may go, and so also will the interests of security, in order that the inhabitants of occupied territory may not be incited to rise in insurrection.

## TWELFTH LECTURE

### Contributions of War

**T**HIS is the appropriate term for requisitions in money. Requisitions in kind and contributions are, as a matter of fact, two acts of the same nature. They are acts of constraint, generally enforced against a local political unit as representing the inhabitants, in order to obtain from them services and things; in kind in the case of a requisition; in money in the case of a contribution.

**ORIGIN OF CONTRIBUTIONS OF WAR.**—In other days, when all property of the enemy was a good prize, without distinction between the property of the state and that of individuals, contributions of war played an important rôle. For a long time the idea was accepted that “war should support war.” During the wars in Italy, Bonaparte sent to the Directoire millions, which he had procured by levying contributions in the occupied country. Contributions of war were then looked upon as a ransom for pillage and burning. Thus, all sought to free themselves and purchase immunity from booty, pillage and devastation by the payment of a sum of money. But today pillage is no longer permitted; one cannot, therefore, explain contributions by this argument.

**CASES IN WHICH CONTRIBUTIONS OF WAR ARE LEGITIMATE.**—There are two cases which are foreseen by Article 49 of the rules of The Hague:

(1) When contributions of war are levied to take the place of taxes with a view to administering the occupied territory. (This case we have already examined.)

(2) When a contribution of war is substituted for requisitions in kind in order to buy supplies which the army needs.

Practically, the latter form of action tends to become more and more general; armies often substitute contributions for requisitions. This method of substitution has its advantages, but it also has its disadvantages, and it raises difficulties from a theoretical point of view.

The advantages which may result from the method which we have just outlined are the following: The occupant will buy things which he needs with money obtained by means of contributions, and by this very fact will procure them more readily. There are, most certainly, things which the inhabitants will hide if there be requisitions, whereas in the case of purchases made thanks to sums furnished by contribution, since they will no longer have any interest in concealing them, they will allow supplies to appear which the army may need but which had remained carefully hidden.

The invader and the occupant will also exercise, by making use of contributions, one less method of irritating the inhabitants, will economize time, avoid disorder, and assure the troops better supplies, because when requisitioned, the inhabitants will ordinarily deliver only supplies of inferior quality.

The inhabitants will also find an advantage, since the contribution will permit the apportionment of the sacrifice demanded to the resources of each and better spread the required sum among those taxed, whereas, in the case of a requisition in kind, only those who possess the things requisitioned will suffer, at least for the time being.

But the method also has its inconveniences; it may lead to greater abuses, perhaps, than those resulting from requisitions in kind. In regard to the

latter, there must be a relation between the needs of the army and the things requisitioned. In addition, the inhabitants may be more exposed in certain cases: One body of troops will ask for a sum of money, another for things in kind: The new troops which replace the first cannot ask for a sum of money since the preceding troops have already insisted on that; they will requisition the things which were understood to be protected by means of the contribution which had been paid. It will end in everything being requisitioned; things in kind, and money, and the inhabitants, after having first paid in money, will often be obliged to pay the second time in kind.

One can see that if a sum of money is required, there is a greater possibility of abuses being committed; nevertheless, the substitution of the contribution in cash for the requisition in kind, suggested by the conference of The Hague in 1899, did not occasion any difficulty in the conference of 1907.

Besides the two cases which have just been examined, there are occasions where contributions of war are levied under title of fines. These contributions lend themselves to the arbitrary. As a matter of fact, they have often been insisted upon and in unjust and absurd amounts; for example, when a commune was held responsible for acts which had occurred on its territory (Bridge of Fontenoy,) with the object of obliging a commune to paralyze the effort of its own compatriots and to prevent, by terror, recurrence of certain acts. Today, by applying Article 50 of the rules of The Hague (laws and customs of war on land), we see that this method of action is prohibited.

“No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”

(Surprise was caused by the acceptance of this clause, without protest, by the German delegates.)

Thus, when individual acts are committed a contribution may not be imposed under title of a fine. The communes have not the necessary police power to prevent the accomplishment of certain individual acts; collective, concerted movements alone, the movements of "ensemble," might carry with them a collective penalty, pecuniary or otherwise.

To assemble the inhabitants of a commune on whose territory an individual act has been committed, and to draw lots for two of them to be shot is an outrageous act. Such was the case of those unfortunate young men of Vaux, in the Ardennes, who were shot on October 28, 1870, because it had been impossible to catch another inhabitant guilty, it was said, of having killed a Prussian non-commissioned officer; who, it seems as a matter of fact, had been killed in a regular engagement against the *Francs-Tireurs*. All the young men of the village were confined in the church, and lots were drawn for the two victims.

Outside of the cases above cited, there are no circumstances in which contributions of war would be legitimate. Clearly, we may set aside the cases where the contributions would be simply a method of gaining treasure, or where they would only tend to exercise pressure upon the inhabitants to force them to desire peace. This would be to employ pillage, organized after a more or less disguised fashion, in order to obtain the cessation of hostilities.

**THE COLLECTION OF CONTRIBUTIONS OF WAR.**—The collection of contributions in money must be organized after a more strict fashion than that of requisitions in kind. In regard to contributions, there is an international question involved. They never result from as urgent a need as do prestations in kind; their collection must be organized in a more rigid

fashion; this is a guaranty against abuse. They should be ordered only by the highest authorities.

Our Field Service Regulations say that contributions "are generally collected by the local authorities on orders from the Commander of an invading army."

Article 51, paragraph 1, of the rules of The Hague, reads as follows:

"No contributions shall be collected except under a written order, and on the responsibility of a Commander-in-chief."

There must, therefore, be a written order and there should be a receipt. This receipt will permit one who has contributed to avoid being struck a second time, or prevent his claiming an improper reimbursement.

The second paragraph of Article 51 adds that as far as possible these contributions will only be levied under the rules of assessment and incidence of the taxes in force.

This is absurd. It will be impossible for the occupant to conform to this requirement; he will lack the personnel and the matériel, which will have disappeared at the same time as the tax lists of the locality. There will remain only the municipalities, to whom will be addressed the orders for contributions, and who will arrange among themselves, as best they can, for their execution.

To end the question of contributions of war, there remains a word to be said in regard to a theory which has recently been put forth respecting their justification. It has been said that sometimes contributions constitute a species of advance on the war indemnity which is to follow. This is a theory which cannot be admitted; such an argument cannot be taken seriously. Obviously it is not certain that the invader or occupant will be the ultimate conqueror, or, even if he be, that he will have the right to an

indemnity. In the case where an indemnity is due, it should be raised over all the territory of the conquered country and paid by the entire nation and not by the population of a particular part of the territory temporarily occupied. The German manual may be quoted here:

“Contributions should not have the character of an arbitrary enrichment of the conqueror. Particularly, the conqueror is not authorized to cover the cost of the war, even should it have been imposed upon him by the adversary, by means of entrenchments on private property.”

In the following case, for example, a contribution was not warranted: On the 29th of September, 1870, the mayor of Versailles received an order through which the German authorities notified him that in order to indemnify the crews of German commercial vessels who had been taken prisoners, and the Germans who had been expelled from France, the King of Prussia had decided to tax the occupied departments by a contribution of a million francs. The share due from the city of Versailles was 400,000 francs. This sum was to be paid within the delay of a week.

Even admitting that an indemnity was due under the above facts, it would not be due from the departments occupied alone. Besides, a contribution of this nature could not be considered as an advance on a war indemnity. It was arbitrary. The mayor of Versailles replied to the German authorities that the city had already been very much tried, and that it was impossible for it to procure the sum demanded in so short a time. He refused to pay, and the German authorities waived the contribution.

### **Railroads in Time of War**

#### **THE IMPORTANCE OF RAILROADS IN TIME OF WAR.**



—Railroads play a more or less important rôle in modern wars, either as a means of attack, a means of defense, a means of going forward or of retreating, of supplying the combatants, or of evacuating the sick and wounded. So the various states have taken it upon themselves to establish regulations in regard to the exploitation of railroads in time of war.

While what follows in regard to railroads is largely based on European continental conditions it is applicable in law to the United States since we have adhered to the conventions, and the question is one of the use of property. Should at some future time the government take over the ownership of our railroads, the applicability of the conventions will be marked.

**EXPLOITATION OF RAILROADS IN TIME OF PEACE AND IN TIME OF WAR.**—There are various systems of exploitation in all countries in time of peace. Sometimes the exploitation is by the state alone, and sometimes by private companies. In France the system is a mixed one, and both modes of exploitations are used. The railroads are exploited by the state or by private companies. Where the companies exploit, they are the owners of the stations and of the rolling stock, but the right of way itself forms part of the public domain of the state which is conceded to the company's use for a time.

In Germany most of the railroads are government property and in Russia virtually all of them are. In other continental states the ownership and method of exploitation vary. In England, as in the United States, the railroads are private property.

Whatever be the method of exploitation, the state exercises a most important control over the railroads from the point of view of the needs of war.

At a time of mobilization the French government may requisition the railroads by virtue of the laws of July 3, 1876, and moreover, the law of December 28,

1888, place the railroads, in time of war, at the disposal of the minister of war. In case of mobilization the government lays its hands on the railroads which pass, so to speak, as a whole to the state. In the United States the law of June 29, 1906, affords some assistance; it contains an amendment to the Interstate Commerce Act and reads as follows:

“That in time of war and threatened war preference and precedence shall, upon the demand of the President of the United States, be given over all other traffic, to the transportation of troops and material of war, and carriers shall adopt any means within their control to facilitate and expedite the military traffic.” (84 Stat. 584)

Beyond this there is no law of the United States bearing directly on the handling of railroads in time of war. Of course what has been said in regard to requisition applies to common carriers as well as to other property owners.

**RIGHTS OF BELLIGERENTS OVER RAILROADS FROM THE VIEWPOINT OF INTERNATIONAL LAW.**—A distinction must be made between the right of way, which may belong to the state, and the stations and rolling stock which, belong to the state or to private corporations, according to the system of railroad exploitation in force.

**THE RIGHT OF WAY.**—The invader or occupant has the right to seize the right of way and use it for his own account, or to prevent its use by the adversary. He may even destroy it in the course of military operations, when this destruction is necessary to his security. The military authorities may, in order to prevent the march of an adversary, have an interest in blowing up a bridge, in destroying a line; and the right of the adversary is the same whatever be the method of exploiting the railroad. These

destructions may therefore take place when military operations require it.

It is perhaps unnecessary to state that in the United States the government has no more title to the right of way of a railroad than it has to any other private property except in those cases where a railroad company has obtained an easement over Federal land. Of the right of a government, however, to make use of a railroad right of way, whatever be the title to it, as a measure of war necessity there can be no doubt.

But in case of sudden invasion, for example, if these measures are incautiously taken, grave danger may result to moving trains, and to private persons.

This may happen, particularly when, as the result of a bold raid, the destruction of a part of the right of way has been accomplished on territory occupied by the enemy.

Certain authors have asked that, in such cases, the adversary be notified in order that accidents be prevented. The occupant or the invader has the right to use the right of way and even to destroy it whatever be the ownership thereof, without previous notice. But it is to be hoped, particularly in view of a case, such as that mentioned above, that hostilities will not be commenced without notice. When one operates on ones own territory in order to retard the invader, the question is one of domestic right. But undoubtedly the invader has the same right to use the right of way as he would to use a road.

STATIONS, ROLLING STOCK, ETC.—The question is a very simple one, when the invader or the occupant uses, on the right of way, his own matériel, but what is the right of the occupant in regard to the matériel of the adversary?

Clearly, if the adversary has been foresighted, the occupant will not have occasion to use much of

the matériel. The adversary will run it off at the beginning of the operations. However, there may have been a surprise, a blockade, a damaged line. Here, theoretically, one must distinguish between the rolling stock of private companies and that of the state.

In regard to the rolling stock of railroad companies, the general rule in regard to the respect for private property must be applied. The invader or occupant may not appropriate to himself this matériel, but he may use it if necessary by means of requisition.

If it be the rolling stock of the state, the question presents itself under a different aspect, since here the principle of respect for private property is not as absolute. A difference is recognized between personal and real property. In regard to personal property, there is a subdistinction between matériel adaptable to war use and matériel not so adaptable.

All property usable in the operations of war is liable to appropriation. Should the rolling stock belonging to the enemy state be classed in this category? May it be the object of confiscation? There are cases where no doubt is possible; as, for instance, where the rolling stock has been especially prepared for the operations of war (iron clad locomotives, etc.). Matériel of this kind is a good capture.

But what will happen in regard to the rest of the matériel? It is matériel which is occasionally used for a purpose of war in the same way as are wagons, when requisitioned, but which in time of peace have a commercial purpose. It seems going very far to say that this matériel is a good capture, because, incidentally, it may serve for the purpose of war. It may be retained, it may be held and utilized, but to conclude, there should not be confiscation in either

case. There is no right of confiscation; there is simply a right to use.

**ROLLING STOCK OF NEUTRAL STATES.**—France and Germany are neighbors of three neutral states (Switzerland, Luxemburg and Belgium). It may happen at the beginning of a war railroad cars belonging to one of these neutral states will be found in the territory of a belligerent. Will they be an object of appropriation, or will they be immediately returned? After discussion, they adopted, in 1907, the following rule:

“Railway matériel coming from the territory of neutral Powers, whether it be the property of the said Powers or of Companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.”—

Article 19, of Convention respecting the rights and duties of neutral powers.

Then the inverse case was prepared for; it may be that in the neutral country there are French or German cars. The neutral may only hold these cars until they are exchanged. “A neutral power may likewise, in case of necessity, retain and utilize to an equal extent matériel coming from the territory of the belligerent Power.

“Compensation shall be paid by one party or the other in proportion to the matériel used and to the period of usage.”

**THE COMMERCIAL USE OF RAILROADS BY THE OCCUPANT.**— It may happen that a belligerent will undertake a commercial and economic exploitation of the railroads of the country which he occupies. Under what conditions shall the exploitation take place, and what will be the tariffs applied? In general the occupant will apply his own tariffs, and consider the lines of the occupied country as a prolongation of his

own lines. There will be profits realized from this commercial exploitation; to whom will they belong? The rule is very simple.

If it is a case of a railroad normally exploited by the enemy state, the occupant will appropriate the revenues. If it is a case of a railroad exploited by a private company, and the occupant appropriates to himself the net profits, he would be confiscating private property; he will therefore owe to the company an accounting of the profits realized.

### **The Right of Indemnity of Those Who Suffer Loss and Damage Caused by War**

War may carry with it losses of various kinds, having many causes—loss of matériel, destruction and deterioration of private property, requisitions and contributions levied, etc.

Shall these losses be ultimately borne by those who have suffered them, or is there a recourse for their benefit?

This is a question of domestic law which has been very much discussed. It presents itself to every belligerent and particularly to the vanquished.

It seems very unjust to allow the victims to support alone the weight of the damage caused by war, since the latter has been the result of an act of the state.

Is then the state charged with the obligation of indemnifying the victims? The French laws were quite severe in their provisions. A law of 1853 held that any destruction coming as an act of war gives right to an indemnity only if there has been a preliminary destruction of a piece of property as an ultimate preparation for an incident of war.

The question was discussed with much feeling in 1871. Mr. Thiers caused to be adopted the idea that

there was for the state no legal obligation to repair the damage caused by war, but only a moral obligation to succor the victims of the conflict. There is here then, for the state but a simple moral duty: a duty to fulfill, and not an obligation. We may determine the measure of our charity according to the extent of our resources; whereas, we could not so determine the measure of our obligation.

We have no statutes determining the question. After the Civil war innumerable claims for indemnity were advanced by Union sufferers and aliens. These were handled by the government in various ways and the conclusions reached were based on various broad principles which when digested will guide us in the future in the absence of direct legislation.

The usually accepted doctrine, and this is the one held by the United States, is that for property destroyed in the active train of war, as a building demolished or burned by shell fire, no compensation is due; but that property destroyed in the preparation for war may be paid for. Thus, a privately owned house situated on a battlefield and in the line of fire, may be entirely destroyed without the owner having a right to compensation; if we suppose, on the contrary, a house within our lines, demolished in order to establish a defensive position, or partially demolished in order to furnish an element in the defenses, we have a case where the owner may claim compensation, so also, where the boards, joists, etc., are removed from the house to make a bridge for the military. This was the principle followed by the Board of Officers on Claims, established in Manila to consider claims following the insurrection in the Philippines, in determining the question of indemnifying persons who alleged losses of property during the various campaigns.

After the war of 1870-71 it was at first decided

by France that the sum of one hundred million francs should be allowed the victims of the war; then France went to two hundred million francs, although the grand total of the damage done had been estimated at a sum above four hundred million francs.

The question is one of domestic law and not of international law.

France paid no regard to the nationality of the claimants, and indemnified without distinction the inhabitants of its territory.

The Germans, guided by political insight, indemnified very largely in Alsace without distinction of nationality, but they allowed nothing to the Swiss. Before acting they had asked of the Swiss government an undertaking of reciprocity. Switzerland had refused to enter into it, and the natives of Switzerland who lived in the territory of Alsace received nothing.

### **The Enforcement of the Laws of War**

The question of the enforcement of the laws of war is not susceptible of an absolute solution. It presents itself naturally as the last of those having relation to the laws of war. At The Hague it was deliberately left aside.

The international conventions of 1899 and of 1907 established numerous rules more or less precise. What prospect is there of these rules being observed? What shall be the penalty to apply if they are not?

There is not here, as in domestic law, a superior authority which requires the observation of the rules adopted. The rules of international law are not sanctioned by force; everything depends on the good will and good faith of the parties. The best method of bringing other nations to the observance of the laws of war is to set an example by observing them oneself. And for this reason they should be made



known to all; the soldiers of all nations must know that which they required to do.

The difficulties which a lack of the observance of the laws of war may raise, result either from questions of fact or from questions of law.

(1) **QUESTIONS OF FACT.**—When a violation of the laws of war is charged against an adversary a conservative attitude should at first be assumed; the tendency is to admit but scant justice in an enemy. It is often very difficult to know if a reprehensible act has really been committed or not; the exaggeration of witnesses should be considered. It may have been due to an involuntary error that a flag of truce or an hospital were fired upon; the injured belligerent may not see what necessity existed for such action, but the other belligerent may have an excuse. In such cases one should begin, therefore, by obtaining the proofs and should make complaint only when they have been secured.

(2) **QUESTIONS OF LAW.**—Questions of law may also be presented. The facts are certain in themselves, but the belligerent who is responsible for them may answer: "What I did I had a right to do," because while there are certain rules which are positive and clearly determined, there are other rules of custom in regard to which a clear understanding has not yet been reached.

(3) **INDIVIDUAL ACTS.**—There may also be individual acts contrary to the laws of war; if the authors are known, action should be taken.

Repression is quite easy when it concerns individual acts, the authors of which are known, and where the acts were not authorized by competent authority.

Entirely different is the collective act committed with the consent of the military authorities. One may protest and ask, of the belligerent at fault,

reparation of the act committed. But if one cannot obtain satisfaction, what is to be done? What course of action remains?

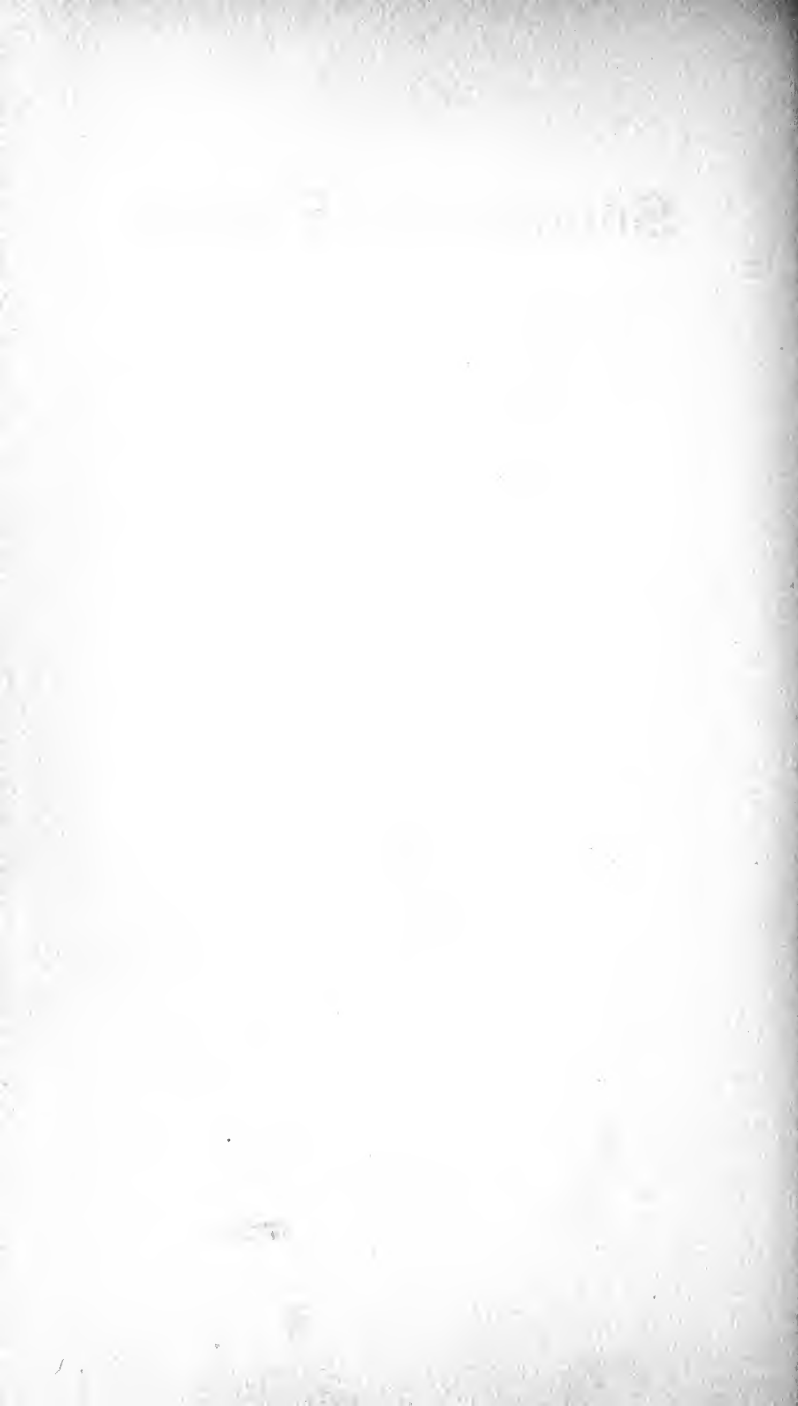
REPRISALS.—We only find reprisals. Reprisals are acts contrary to law which are committed to meet other acts contrary to law, about which complaint is made. They should be looked upon as a means of obtaining from the enemy the cessation of a state of things which one considers as illicit and unjust. It is neither vengeance nor punishment: *it is a means of coercion*. The limit is difficult to determine.

The gravest fault in regard to reprisals is that of striking the innocent. In 1812, during the Anglo-American war, England—adopting the principle that there is a perpetual allegiance which requires that an Englishman shall never lose his nationality, even if he be naturalized abroad—declared that it considered as traitors, and would cause to be shot to death all the English, naturalized as Americans, that it captured. To this threat of the English the United States answered that for every prisoner which the English should cause to be shot under these conditions it would cause to be shot three Englishmen. Here is a striking example of a *threat* of reprisals, because it seems that as the matter stood no one was executed on either side.

The question of reprisals is not mentioned in the rules in regard to the laws and customs of war adopted in 1899 and 1907.

It would be well, however, if the right of reprisals were regulated. If it can be suppressed it should be. But if this is not possible, if reprisals are a necessity, it is better to define them by limitation than to allow them a free career in obedience to an exaggerated sentiment of humanity and of delicacy.

## APPENDIX



# SUGGESTED FORMS

FOR

MILITARY PASSES, *etc.*, AS  
WELL AS FOR CERTAIN  
MILITARY AGREEMENTS  
SUCH AS ARMISTICES, *etc.*

TOGETHER WITH ILLUSTRATIONS OF  
THE LATTER

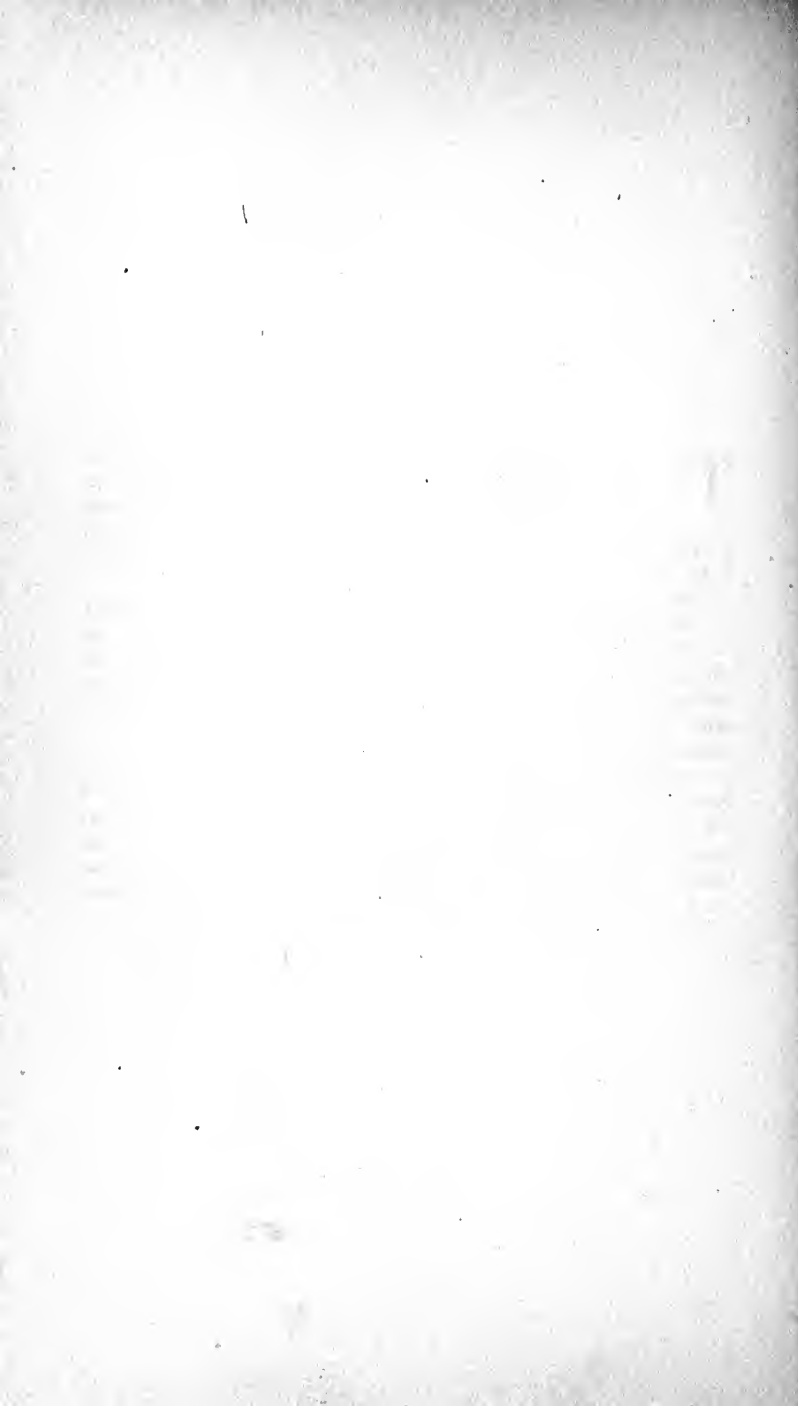
---

PREPARED FOR THE USE OF  
THE ARMY SERVICE SCHOOLS BY  
LIEUTENANT COLONEL J. B. PORTER,  
JUDGE-ADVOCATE U. S. A.,  
SENIOR INSTRUCTOR IN LAW



FORT LEAVENWORTH, KANSAS  
PRESS OF THE ARMY SERVICE SCHOOLS

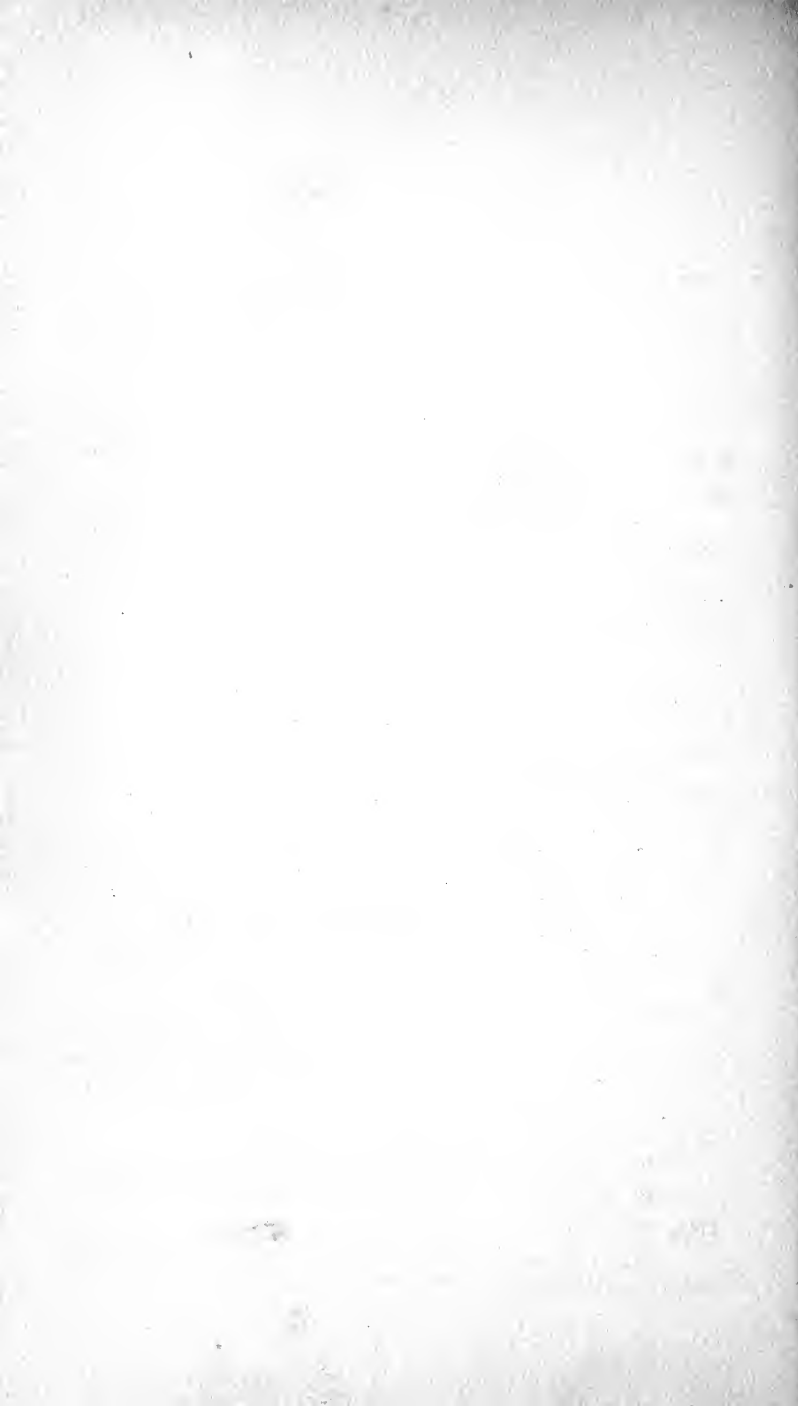
1914



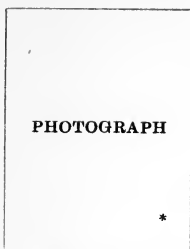
**T**HE following forms and illustrations of certain military orders and agreements have been compiled for use in connection with the lectures on International Law prepared for The Army Service Schools by Lieut. Colonel J. B. Porter, Judge-Advocate, Senior Instructor, Department of Law.

While in regard to military agreements it is probable that in no two cases will the circumstances of the agreements be the same, it is believed that it will be to the advantage of officers to become familiar with certain suggested forms and with the examples given of agreements which have actually been accomplished.

Attention is invited to the fact that while in an actual case many of the articles set forth in the forms may have to be changed or eliminated, the necessity for a most precise, even minute, statement of all the items to be covered by the agreement remains. Every item which otherwise might lead to a misunderstanding should be determined in advance and clearly covered by the terms of the agreement.







## PASS

(Place and Date of Issue.)

..... living at .....  
(or if on a mission, the mission to  
be stated), is authorized to pass out  
of the lines for the purpose of  
.....

He will cross the lines by the road leading from  
A to B (or at a point named) during (the forenoon,  
afternoon or day) of (give date).

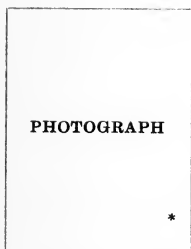
He is authorized to take with him (persons, arti-  
cles or vehicles).

He will proceed to (name destination) by the  
route C. D. E.

.....  
(Signature of Officer.)

.....  
(Rank, Etc.)

NOTE.—This pass is strictly personal and will be void  
unless used on the date mentioned.



## SAFE-CONDUCT

(Place and Date of Issue.)

..... residing at .....  
(or if on a mission, the mission to  
be stated) is authorized to proceed  
to ..... for the pur-  
pose of .....

He will follow the route A. B. C.

He is authorized to take with him (persons, arti-  
cles, vehicles).

\*Today it is deemed advisable that, when possible, a portrait of the  
bearer should be attached to passes and safe-conducts.

This safe-conduct is good until .....

All military authorities are directed to protect the bearer of this safe-conduct and in no wise to molest him.

.....  
(Signature of Officer.)

.....  
Rank, Etc.

NOTE.—This safe-conduct is strictly personal and shall be void unless used within the time fixed.

---

## SAFE-GUARD

(Place and Date of Issue.)

All officers and enlisted men belonging to the (*name army, or subdivision thereof*) are directed to respect the premises of ..... situated at

.....  
No requisitions thereon, nor damage thereto, will be permitted, and protection will be afforded by all officers and enlisted men against any person who shall attempt to act in violation of this order.

.....  
(Signature of Officer.)

.....  
(Rank, Etc.)

NOTE.—*57th Article of War:* Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safe-guard, shall suffer death.

*63d Article of War:* All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war.

## FORM FOR A SUSPENSION OF ARMS

General A.B., commanding the forces of the United States at ....., and General C.D., commanding the forces of ..... at ....., agree as follows:

Art. 1. A suspension of arms for the space of three hours, beginning at ten o'clock a.m. and ending at one o'clock p.m. on this ..... day of ..... is agreed to for the purpose of burying the dead and withdrawing the wounded.

Art. 2. The beginning of the suspension of arms shall be notified by two white flags hoisted simultaneously, the one at ..... within the United States lines, the other at ..... within the ..... lines. The white flags shall continue flying during the suspension of arms, and such flags shall be lowered simultaneously as a signal of the conclusion of the suspension of arms.

Art. 3. All firing shall cease during the suspension of arms.

Art. 4. The troops of the United States shall not, during the suspension of arms, advance beyond the line, which they now occupy and the ..... troops shall not advance beyond the line which they now occupy. The space between the two lines shall be open to all persons engaged in burying the dead, or in attending to the wounded, or in carrying away the dead or the wounded, but to no other persons.

A. B. ....

C. D. ....

Date .....

### Illustration of a Suspension of Arms

SIEGE OF BELFORT, 13TH FEBRUARY, 1871

It has been agreed by the undersigned: Captain Krafft of the Auxiliary Engineers, and Captain von Schultzen-  
dorf,

General Staff of the besieging army, both furnished with full powers by Colonel Denfert-Rochereau, Commandant of Bel-fort, and by Lieutenant-General von Treskow, Commandant of the besieging corps.

As follows:

- (1) Lieutenant-General von Treskow will send a telegram to Versailles to acquaint the Imperial Chancellor Count Bismarck, that Colonel Denfert-Rochereau requires direct instructions from his government as regards the surrender of the fortress.
- (2) Colonel Denfert-Rochereau will send an officer to Bâle to await the telegraphic instructions from the French Government.
- (3) Until the return of this officer there will be a suspension of arms between the besieged and besiegers, beginning the 13th of February at 11 p.m. Nevertheless the suspension of arms may be denounced at any moment twelve hours before the time intended for the resumption of hostilities.
- (4) During the suspension of arms the two parties shall remain in their present positions. The limits thus traced shall not be crossed, and, moreover, there shall be no communication on the part of civilians between the fortress and the outside.
- (5) Colonel Denfert-Rochereau engages to inform Lieutenant-General von Treskow with the least possible delay of the decision he makes after receiving the instructions of the French Government.

The present convention has been made in duplicate original, one text in German and the other in French.

[Signed] KRAFFT.  
VON SCHULTZENDORF.

13th February, 1871.

---

## FORMS OF ARMISTICES

### For an Army in the Open Field

Colonel A.B., authorized by General C.D., U. S. Army, commanding the forces of the United States

in ....., and Major X. Y., authorized by General Z. W., commanding the ....., agree to the following articles:

Art. I. On publication of this armistice, hostilities shall cease between the forces of the United States and of ..... at all points along the frontier of ..... between ..... and .....

Art. II. The armistice shall continue until noon on the ..... day of ..... and until such further time as is herein mentioned.

Art. III. Either side may at any time on or after the said ..... day of ..... give six days' notice of its intention to determine the armistice and the armistice shall be determined at the expiration of such six days. Notice shall be given by writing, stating the intention to determine the armistice, and sent from the headquarters of one army to the headquarters of the other army. In reckoning time for the purpose of the said six days' notice, the day on which the notice is given at whatever hour the same may be given, shall be reckoned as an entire day, and the armistice shall expire at midnight on the fifth day succeeding the day on which the notice is given.

Art. IV. The lines of demarcation shown on the attached map shall be strictly adhered to during the armistice. The territory lying between the two lines of demarcation shall be strictly neutral, and any advance into it by any members of either army is prohibited except for the purpose of communication between the two armies. Neither army shall extend its line in a ..... or ..... direction beyond the points shown as the extremities of their respective lines.

Art. V. Subject to the restrictions mentioned in the 4th Article, as respects making an advance

into the neutral territory, either army may take measures to strengthen its position, and may receive reinforcements and stores of warlike and other material, and may do any other act not being an act of direct hostility.

Art. VI. During the two days following the day on which this armistice is ratified, burial parties from both armies shall be permitted to visit the battlefield of the ..... instant, for the purpose of burying the dead.

Art. VII. The main road from A to B via C will be used for communication between the commanders ..... of the two armies.

Art. VIII. During the continuance of the armistice, the peaceful inhabitants of the country shall be allowed to pursue their occupations, and to buy from or sell to either army provisions or goods, but any measures consistent with the observance of the articles of the armistice in relation to the neutral territory may be taken by either army to prevent inhabitants, after entering the lines or obtaining information respecting one army from passing or carrying information to the other army.

Art. IX. This armistice shall come into force immediately on its ratification by the ..... of the two armies, and officers shall be despatched with all speed, from the headquarters of each army, to give notice of the armistice at all points along the line.

A.B. ....

X.Y. ....

---

### **For Forces Engaged in Siege Operations**

General A.B., commanding the forces of the United States in ....., and General C.D., com-

manding the garrison of ....., agree to the following articles:

Art. 1. An armistice between the troops of the United States investing ..... and the troops forming the garrison of ..... shall begin at noon on ..... and shall end at noon on the .....

Art. 2. White flags shall be hoisted simultaneously at the beginning of the armistice, the one at ..... within the United States lines and the other at Fort ..... The flags shall be kept flying during the continuance of the armistice, and shall be lowered simultaneously at its conclusion.

Art. 3. Provisions to the extent of ..... rations shall be supplied daily for the use of the garrison by the besiegers on payment of such sums as may be agreed upon as the value thereof by commissioners to be appointed by the above named commanders respectively. The provisions shall be delivered to persons authorized to demand the same by the general commanding the garrison, at such times, and in such places in front of the United States lines, as may be agreed upon by the above named commanders, and shall be conveyed to the garrison by the persons authorized as above stated.

Art. 4. Save in so far as is provided by Article 3, or as may be agreed upon by the above named commanders, it is agreed that the garrison shall not attempt to obtain succor, and that no communication whatever shall, during the armistice, take place between the garrison, and either friend or enemy, and a space of ..... around the fortifications shall be considered neutral ground, and no person whatever, whether he be a stranger or belonging to the garrison, or to the besieging army, shall be allowed to enter on such space without the permission of the above named commanders.

Art. 5. And General C.D., commanding the garrison, engages on behalf of the garrison not to repair the fortifications, or to undertake any new siege-works, or to do any act or thing whatsoever calculated to place the garrison in a better position in regard to its defense; and General A.B., on behalf of the troops of the United States, engages not to undertake any siege-works, or to make any hostile movement against the garrison, but it is understood that he is at liberty to obtain fresh supplies of provisions or reinforcements of troops.

Date..... A.B.....  
C.D.....

---

## ILLUSTRATIONS OF ARMISTICES

### Armistice Agreed Upon by Japan and Russia at Portsmouth (U. S. A.) on 5th September, 1905

The undersigned plenipotentiaries of Japan and Russia, duly authorized to that effect by their respective governments, have agreed on the following terms of the armistice which will remain in force until the execution of the treaty of peace:

- (1) A certain distance (zone of demarcation) shall be fixed to separate the front of the armies of the two powers in Manchuria, and also in the Tumen region.
- (2) The naval force of one of the belligerents may not bombard the territory occupied or belonging to the other.
- (3) The taking of maritime prizes will not be interrupted by the armistice.
- (4) During the armistice, no reinforcements may be sent to the theatre of war. Those who are on the way from Japan may not be sent north of Mukden and those on the way from Russia may not be sent south of Harbin.



- (5) The commanders of the military and naval forces will arrange the details of the armistice in accordance with the principles above enunciated.
- (6) The two Governments will issue the order to put this protocol into execution directly after the signature of the treaty of peace.

[Signed] WITTE. [Signed] KOMOURA.  
ROSEN. TAKAHURA.

The peace was signed 5th September, 1905, at 3:50 p.m.

*(The foregoing armistice was agreed upon by the plenipotentiaries when it became apparent that the terms of a peace would be reached. The practical armistice under which the armies acted is the following one:)*

---

### **Protocol of the Conditions of the Armistice Concluded in Manchuria on 13th September, 1905**

Art. 1. Fighting is suspended throughout the extent of Manchuria.

Art. 2. The space between the front lines of the Japanese and Russian armies which are indicated on the maps exchanged with the present protocol constitutes the neutral zone.

Art. 3. Every person having the least connection with either of the armies is forbidden to enter the neutral zone on any pretext whatsoever.

Art. 4. The road leading from Shuang-miao-tzu to Sha-ho-tzu is to be employed for communication between the two armies.

Art. 5. The present protocol will come into force on the 16th (Russian style 3d) September, 1905, at mid-day, and will remain in force until the execution of the treaty of peace, signed at Portsmouth by the plenipotentiaries of the two Powers.

The present protocol is signed by the representatives of the commanders-in-chief of the Japanese and Russian armies in Manchuria, in virtue of the full powers which have been given to them by the said commanders-in-chief.

Done on the road situated close to Sha-ho-tzu the 13th September, 1905, in two texts, Japanese and Russian, each party keeping a Japanese and a Russian text.

[Signed] FUKUSHIMA,  
Major-General, etc.  
ORANOUSKI,  
Major-General, etc.

## Japanese Project for the Armistice in the Tumen Region

Art. 1. The Japanese and Russian armies in the Tumen region will execute the armistice according to the stipulations of the present convention.

Art. 2. The Japanese army will canton south of the line ..... The positions of the Russian army will be limited to north of the line ..... The region between these two lines will form the neutral zone.

Art. 3. No troops, patrols or men sent on reconnaissance, nor any individual belonging or attached to the army will be permitted to enter the neutral zone.

Art. 4. No preparations for attack or defense will be made near the line limiting the neutral zone. The necessary preparations for cantoning the troops will not be considered as preparations for attack or defense.

Art. 5. No requisitions for coolies, horses or any other objects will be made in the neutral zone.

Art. 6. The Japanese and Russian armies in the Tumen region will both commence to evacuate their troops beyond the lines indicated in Art. 2 on the third day and must have completed the evacuation behind the lines by the seventh day from the signing of the present convention.

Art. 7. Once the convention is drawn up, the commander of the Japanese and Russian armies will order the troops and officials under their command to execute the armistice in such a manner that the order may reach them as soon as possible. They will at the same time notify the commanders of the land and sea forces.

Art. 8. This convention will come in force immediately it has been signed by the plenipotentiaries of the Japanese and Russian armies; it will lapse on the execution of the treaty of peace.

Art. 9. The present convention will be drawn up in two Japanese and two Russian texts, each army keeping a text in each language.

*(This project was not agreeable to the Russians and an armistice had not been concluded when the treaty of peace was ratified.)*

## ILLUSTRATIONS OF ARTICLES OF CAPITULATION

---

### Surrender of the Army of Northern Virginia

*The following agreement of capitulation, in the form of a letter and acceptance, is very simple in its terms. It is given here as an indication of what may be done; although it would seem to be extremely doubtful if any articles of capitulation of a foreign enemy could be reduced to such simple items.*

APPOMATTOX C. H., VA.,

*Apl 9th, 1865.*

Gen. R. E. LEE,

*Comd'g C. S. A.*

GEN.: In accordance with the substance of my letter to you of the 8th inst., I propose to receive the surrender of the Army of N. Va. on the following terms, to wit: Rolls of all the officers and men to be made in duplicate. One copy to be given to an officer designated by me, the other to be retained by such officer or officers as you may designate. The officers to give their individual paroles not to take up arms against the Government of the United States until properly exchanged, and each company or regimental commander sign a like parole for the men of their commands. The arms, artillery and public property to be parked and stacked, and turned over to the officer appointed by me to receive them. This will not embrace the side-arms of the officers, nor their private horses or baggage. This done, each officer and man will be allowed to return to their homes, not to be disturbed by United States authority so long as they observe their paroles and the laws in force where they reside.

Very respectfully,

U. S. GRANT,

*Lt. Gen.*

HEADQUARTERS ARMY OF NORTHERN VIRGINIA,

*April 9, 1865.*

GENERAL: I received your letter of this date containing the terms of the surrender of the Army of Northern Virginia as proposed by you. As they are substantially the same as those expressed in your letter of the 8th inst., they are

accepted. I will proceed to designate the proper officers to carry the stipulations into effect.

R. E. LEE,  
*General.*

Lieut.-General U. S. GRANT.

---

### **Capitulation of Sedan, 1870**

The following treaty has been concluded between the undersigned, the Chief of the General Staff of H. M. the King of Prussia, Commander-in-Chief of the German Army, and the Commander-in-Chief of the French Army, both acting with full powers from King William and the Emperor Napoleon:

Art. 1. The French Army, under the command of General de Wimpffen, at the present time invested by superior forces in Sedan, are prisoners of war.

Art. 2. In consequence of the brave defense of this army, exceptions are made in favor of such general and other officers, including the higher officials with officers' rank, as bind themselves by their written word of honor not to take up arms against Germany, nor to act in any way prejudicial to her interests until the close of the present war.\* The officers and officials, who accept these conditions, will retain their arms and private property.

Art. 3. All other arms, inclusive of the entire war matériel, such as colours, eagles, standards, guns, horses, treasure chests, military carriages, ammunition, etc., will be delivered up to some military authority in Sedan appointed for this purpose by the French Commander-in-Chief, with a view to their being handed over without delay to the German agents.

Art. 4. The fortress of Sedan will then be surrendered in its present state to H. M. the King of Prussia, by the evening of 2d September at the latest.

Art. 5. Those officers who do not accept the obligation mentioned in Art. 2, and the men disarmed, are to be marched off by regiments in parade order. This measure is to take effect from the 2d September, and be completed by the 3d. The detachments are to be brought to the ground encircled by the Meuse near Iges, with a view to their being handed over

---

\*The vague terms here used in regard to the scope of action allowed to paroled officers have been much criticised.

to the German agents by their officers, who will then resign the command to the non-commissioned officers.

Art. 6. The army surgeons will remain behind without exception for the purpose of tending the wounded.

[Signed] V. MOLKE.

[Signed] DE WIMPFEN.

Frénois, 2d September, 1870.

---

### Capitulation of Strassburg, 1870

LIEUT.-GENERAL V. WERDER, of the Prussian Army, commander of the Siege Corps before Strassburg, having been requested by the French Lieutenant-General Uhrich, governor of Strassburg, to cease hostilities against the fortress, has agreed with that officer, in consideration of the honorable and gallant defense of the place, to conclude the following capitulation:

Article 1. At 8 a.m. on the 28th September 1870, Lieutenant-General Uhrich will evacuate the citadel, the Austerlitz, Fisher's and National gates. At the same time the German troops will occupy these points.

Article 2. At 11 o'clock on the same day the French garrison, including the Mobile and National Guard,† will quit the fortress by the National Gate, will form up between Lunette No. 44 and Redoubt No. 37, and there lay down its arms.

Article 3. The line troops and Garde Mobile become prisoners of war and will at once move off with their baggage. The National Guards and franc-tireurs are relieved from making any declaration, and by 1 a.m. will lay down their arms at the Mairie. The list of the officers of these troops will be handed over at that hour to General v. Werder.

Article 4. The officers, and officials with officers' rank, of all the troops of the French Garrison of Strassburg may proceed to a place of abode of their own selection, provided that they make a declaration on their word of honor\*.

Those officers who do not give this declaration will be sent

---

†The National Guard and the Mobile Guard mentioned in these articles of capitulation are forces akin to our constitutional militia when called into the service of the United States; the older men forming a sedentary body known as the "Garde National" and the younger men forming mobile units called the "Garde Mobile". Both these organizations disappeared under the reorganization of the French Army.

\*This declaration, which was probably the usual parole used in the case of military prisoners, would appear to have been formulated in a separate document annexed to the Articles of Capitulation.

as prisoners of war with the garrison to Germany. All the French military surgeons will remain in their present functions until further orders.

Article 5. Lieutenant-General Uhrich binds himself, directly the arms are laid down, to hand over all military stores, government treasure, &c., in an orderly manner through the corresponding officials of the German service.

The officers and officials entrusted with this duty on both sides will assemble at noon on the 28th in the Place de Broglie at Strassburg.

This capitulation was drawn up and signed by the following plenipotentiaries:—The Chief of the General Staff of the Siege Corps, Lieutenant-Colonel v. Leszczynski, Captain and Adjutant Count Henckel v. Donnersmarck on the German side, and on the French side by Colonel Ducasse, commandant of Strassburg, and Lieutenant-Colonel Mangin, assistant-director of artillery.

Read, approved, and subscribed.

(Here follow the signatures)

Confirmed.

[Signed] V. WERDER,

*Lieutenant-General.*

Mundolsheim,  
28th September 1870.

---

## Capitulation at Metz, 1870

---

### Protocol

Between the undersigned, the Chief of the Staff of the Prussian Army before Metz, and the Chief of the Staff of the French Army in Metz, both being delegated with full powers by H. R. H. General of Cavalry Prince Frederick Charles of Prussia, and by H. E. the Commander in Chief, Marshal Bazaine, the following agreement has been ratified:

#### *Ist Article*

The French Army under the orders of Marshal Bazaine are prisoners of war.

#### *IId Article*

The fortress and the town of Metz, with all the forts, the matériel of war, stores of all kinds, and all public property will be handed over to the Prussian Army in the same condition in

which it stands at the time of signing this agreement. Forts St. Quentin, Plappeville, St. Julien, Queuleu and St. Privat, as well as the Mazelle Gate (Strassburg road) will be handed over on Saturday the 29th of October at noon to the Prussian troops. At 10:00 a.m. that day artillery and engineer officers, with some non-commissioned officers, will be admitted into the above mentioned forts, for the purpose of taking over the powder magazines and rendering harmless any mines that might exist.

### *III<sup>d</sup> Article*

The arms as well as the whole of the war matériel of the army, consisting of the colors, eagles, cannon, mitrailleuses, horses, money chests, military wagons, ammunition, and so forth, will be handed over, in Metz and in the forts, to a commission appointed by Marshal Bazaine, for the purpose of being transferred immediately after to Prussian commissaries.

The troops, disarmed, will be drawn up by regiment or by corps, and will be brought in parade order to the places which shall be indicated for each corps.

The officers will then return to the lines of the intrenched camp or to Metz, but on the condition that they are hereby bound on their word of honor not to quit Metz without orders from the Prussian Commandant.

The troops will then be conducted by their non-commissioned officers to their places of bivouac.

The soldiers will retain their knapsacks, effects, and camp equipment (tents, blankets, cooking utensils, etc.).

### *IV<sup>th</sup> Article*

All generals and other officers, in addition to those military officials holding the relative rank of officers, who give their word of honor in writing not to serve against Germany during the present war, nor to act against its interests in any other manner,\* will cease to be prisoners of war.

The officers and officials who accept this condition will retain their arms and personal property.

In consideration of the valor displayed by both the Army and the garrison during the campaign, those officers who elect to be prisoners of war will be permitted in addition to take with them their swords and their personal property.

### *V<sup>th</sup> Article*

All Army Doctors will remain at Metz in order to look after the wounded; they will receive the privileges in conformity with the Geneva Convention. The same is to apply to the personnel of the hospitals.

---

\*The vague terms here used in regard to the scope of action allowed to paroled officers have been much criticised.

*Vith Article*

Explanations with regard to certain points, more particularly with regard to local interests, are treated in an Appendix hereto annexed, which has the same authority as the present protocol.

*VIIth Article*

Any article, which might admit of doubt, will always be interpreted in favor of the French Army.

Done at Château Frescaty, 27th October, 1870.

(Signed) V. STIEHLE.

(Signed) JARRAS.

---

**Appendix**

*Ist Article*

The civil officials, superior and inferior, belonging to the army or the fortress, now present at Metz, may proceed whither they desire and take all their property with them.

*IId Article*

No one, whether he belong to the National Guard, or be he an inhabitant of the town, or a fugitive therein, shall be liable to punishment, either on account of political or religious views, or for any share that he may have taken in the defense, or on account of any assistance he may have rendered to the army or to the garrison.

*IIId Article*

Sick and wounded left in the town shall receive every care which their condition may require.

*IVth Article*

Families which may be left in Metz by the garrison shall not be molested, and like the civil officials, may likewise depart without let or hindrance with all that belongs to them.

The furniture and effects which the members of the garrison are compelled to leave in Metz, shall neither be plundered nor confiscated, but shall remain their property. It will be optional with them to cause this property to be fetched away within a period of six months from the conclusion of peace or their release from captivity.

*Vth Article*

The Commander-in-Chief of the Prussian Army undertakes the duty of preventing any damage being done either to the persons or goods of the inhabitants.



In the same manner the property of the Department, of the parishes, of trade or other unions, of civil or spiritual or other corporations, of work houses or charitable institutions, shall remain uninjured.

The privileges which on the day of the capitulation the corporations and societies, as also private persons may mutually exercise, according to French Law, shall in no wise be interfered with.

#### *VIIth Article*

To this end it is especially arranged that all local administrations, as also the above mentioned societies or corporations, shall retain those archives, books, papers, collections and documents of every kind which may be in their possession.

The notaries, advocates, and other judicial officials shall retain their archives and deeds or deposits.

#### *VIIIth Article*

The archives, books, and papers belonging to the state shall remain generally in the fortress, and at the conclusion of peace all such documents as refer to those districts reverting to France shall be returned to France.

The outstanding amounts, which are necessary for the adjustment of the accounts, or which might give rise to law-suits, to reclamations on the part of third persons, shall remain in the hands of those officials or agents to whom they are at present intrusted; the provisions of the preceding paragraph in this respect undergo amendment.

#### *VIIIth Article*

With regard to the movement of the French troops from their bivouacs as prescribed by Art. III of the Protocol, the following course will be adopted: The officers will lead their troops to the points and in the directions as below prescribed. On arrival at their destinations, they will deliver to the Prussian commander of troops a statement of the effective of the troops under their orders, after which they will hand over the command to the non-commissioned officers and withdraw.

The 6th Corps and Forton's Cavalry Division will follow the road from Thionville to Ladonchamps.

The 4th Corps, moving between Forts St. Quentin and Plappeville along the Amanvillers road, will be led as far as the Prussian lines.

The Guard, the General Artillery Reserve, the Engineers and equipage train of the headquarters, passing along the railway embankment, will take the road to Nancy as far as Tournebride.

The 2d Corps, with Laveaucoupet's Division and Lapasset's Brigade, which belong to it, will move along the road to Magny-sur-Seille, and will halt at St. Thiebault farm.

The Gardes Mobiles of Metz and other troops of the garrison, except Laveaucoupet's Division, will move along the Strassburg road as far as Grigy.

Lastly, the 3d Corps will move along the Saarbrucken road as far as Bellecroix farm.

Done at Château Frescaty, 27th October, 1870.

(Signed) V. STIEHLE.

(Signed) JARRAS.

---

### **Capitulation of Santiago, 1898**

Terms of the millitary convention for the capitulation of the Spanish forces occupying the territory which constitutes the division of Santiago de Cuba, and described as follows: All that portion of the island of Cuba east of a line passing through Aseradero, Dos Palmas, Cauto Abajo, Escondida, Tanamo, and Aguidora, said troops being in command of General José Toral, agreed upon by the undersigned commissioners: Brigadier General Don Federico Escario; Lieutenant-Colonel of Staff Don Ventura Fontan; and, as interpreter, Mr. Robert Mason, of the city of Santiago de Cuba, appointed by General Toral, commanding the Spanish forces, on behalf of the Kingdom of Spain, and Major General Joseph Wheeler, U.S.V.; Major General H. W. Lawton, U.S.V.; and First Lieutenant J. D. Miley, 2d Artillery, A.D.C., appointed by General Shafter, commanding the American forces, on behalf of the United States:

1. That all hostilities between American and Spanish forces in this district absolutely and unequivocally cease.

2. That this capitulation includes all the forces and war material in said territory.

3. That the United States agrees with as little delay as possible to transport all the Spanish troops in said district to the Kingdom of Spain, the troops being embarked, as far as possible, at the port nearest the garrisons they now occupy.

4. That the officers of the Spanish army be permitted to

retain their side arms and both officers and private soldiers their personal property.

5. That the Spanish authorities agree to remove, or assist the American Navy in removing, all mines or other obstructions to navigation now in the harbor of Santiago and its mouth.

6. That the commander of the Spanish forces deliver, without delay, a complete inventory of all arms and munitions of war of the Spanish forces in above described district to the commander of the American forces; also a roster of said forces now in said district.

7. That the commander of the Spanish forces, in leaving said district, is authorized to carry with him all military archives and records pertaining to the Spanish army now in said district.

8. That all that portion of the Spanish forces known as volunteers, mobilizados, and guerrillas who wish to remain in the island of Cuba are permitted to do so upon condition of delivering up their arms and taking a parole not to bear arms against the United States during the continuance of the present war between Spain and the United States.

9. That the Spanish forces will march out of Santiago de Cuba with honors of war, depositing their arms thereafter at a point mutually agreed upon, to await their disposition by the United States Government, it being understood that the United States commissioners will recommend that the Spanish soldier return to Spain with the arms he so bravely defended.

10. That the provisions of the foregoing instrument become operative immediately upon its being signed.

Entered into this 16th day of July, 1898, by the undersigned commissioners, acting under instructions from their respective commanding generals and with the approbation of their respective Governments.

JOSEPH WHEELER,  
*Major General, United States Volunteers.*

H. W. LAWTON,  
*Major General, United States Volunteers.*

J. D. MILEY,  
*First Lieutenant, 2d Artillery,*

*A. D. O. to General Shafter.*

FEDERICO ESCARIO.

VENTURA FONTAN.

ROBT. MASON.

## Capitulation of Manila

MANILA, *August 14, 1898.*

The undersigned having been appointed a commission to determine the details of the capitulation of the city and defenses of Manila and its suburbs, and the Spanish forces stationed therein, in accordance with the agreement entered into the previous day by Major General Wesley Merritt, U. S. Army, American commander-in-chief in the Philippines, and His Excellency Don Fermin Jaudenes, acting general-in-chief of the Spanish army in the Philippines, have agreed upon the following:

1. The Spanish troops, European and native, capitulate with the city and its defences, with all the honors of war, depositing their arms in the places designated by the authorities of the United States, and remaining in the quarters designated and under the orders of their officers and subject to control of the aforesaid United States authorities, until the conclusion of a treaty of peace between the two belligerent nations.

All persons included in the capitulation remain at liberty, the officers remaining in their respective homes, which shall be respected as long as they observe the regulations prescribed for their government and the laws in force.

2. Officers shall retain their side arms, horses, and private property.

3. All public horses and public property of all kinds shall be turned over to staff officers designated by the United States.

4. Complete returns in duplicate of men by organizations, and full lists of public property and stores shall be rendered to the United States within ten days from this date.

5. All questions relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion, shall be referred to the Government of the United States at Washington.

Spanish families may leave Manila at any time convenient to them.

The return of the arms surrendered by the Spanish forces shall take place when they evacuate the city or when the American army evacuates.

6. Officers and men included in the capitulation shall be supplied by the United States, according to their rank, with rations and necessary aid as though they were prisoners of war, until the conclusion of a treaty of peace between the United States and Spain.

All the funds in the Spanish treasury, and all other public funds, shall be turned over to the authorities of the United States.

7. This city, its inhabitants, its churches and religious worship, its educational establishments, and its private property of all descriptions are placed under the special safeguard of the faith and honor of the American army.

F. V. GREENE,

*Brigadier General of Volunteers, United States Army.*

P. B. LAMBERTON,

*Captain, United States Navy.*

CHAS. A. WHITTIER,

*Lieutenant Colonel and Inspector General.*

E. H. CROWDER,

*Lieutenant Colonel and Judge Advocate.*

NICHOLAS DE LA PENA,

*Auditor General, Excmo.*

CARLOS REGES,

*Coronel de Ingenieros.*

JOSÉ M<sup>a</sup>. DE OLAGURO FELIN,

*Coronel de Estado Major.*

---

## Capitulation of Port Arthur, 1904

Art. I. The military and naval forces of Russia in the fortress and harbor of Port Arthur, as well as the volunteers and the officials, shall all become prisoners.

Art. II. The forts and fortifications of Port Arthur, the warships and other craft, including torpedo craft, the arms, the ammunition, the horses, all and every material for warlike use, shall be handed over as they are to the Japanese army.

Art. III. When the above two articles are agreed to, the following steps shall be taken by way of guarantee, namely, by noon on the 3d instant all garrisons shall be withdrawn from fortifications and forts at I-zu-shan, Hsiao-an-tzu-shan, Ta-an-tzu-shan, and all the highlands on the southeast of

these, and the said fortifications and forts shall be handed over to the Japanese Army.

Art. IV. Should it be recognized that the Russian military or naval forces destroy or take any other steps to alter the condition of the things enumerated in Art. II and actually existing at the time of the signature of this Agreement, these negotiations shall be broken off and the Japanese army will break off negotiation and resume freedom of action.

Art. V. The officers of the Russian military and naval forces of Port Arthur shall compile and hand to the Japanese Army maps showing the arrangement of the defenses, the positions of mines and torpedoes or other dangerous objects, as well as lists of the organization of the naval and military forces in Port Arthur, nominal rolls of the military and naval officers, their ranks or grades, similar rolls relating to the warships, lists of the ships of all descriptions and their crews, and tables of the non-combatants, male and female, their nationalities and their occupations.

Art. VI. The arms (including those in the hands of the forces), the ammunition, and all material for war uses (except private property) shall be all left in their present positions. Rules relating to the handing over and receipt of these objects shall be arranged by commissioners from the Russian and Japanese armies.

Art. VII. The Japanese army, as an honor to the brave defense made by the Russian army, will allow the officers of the Russian military and naval forces and the officials attached to the said forces to retain their swords, together with all privately owned articles directly necessary for daily existence. Further, with regard to the said officers, officials, and volunteers, such of them as solemnly pledge themselves in writing not to bear arms again until the close of the present war, and not to perform any act of whatsoever kind, detrimental to the interests of Japan, shall be permitted to return to their country, and one soldier shall be allowed to accompany each officer of the army or navy. These soldiers shall be required to give a similar pledge.

Art. VIII. The disarmed non-commissioned officers and men of the army and navy, as well as of the volunteers, wearing their uniforms, carrying their tents and all privately owned necessities of daily life, shall under the command of their respective officers, assemble at places indicated by the

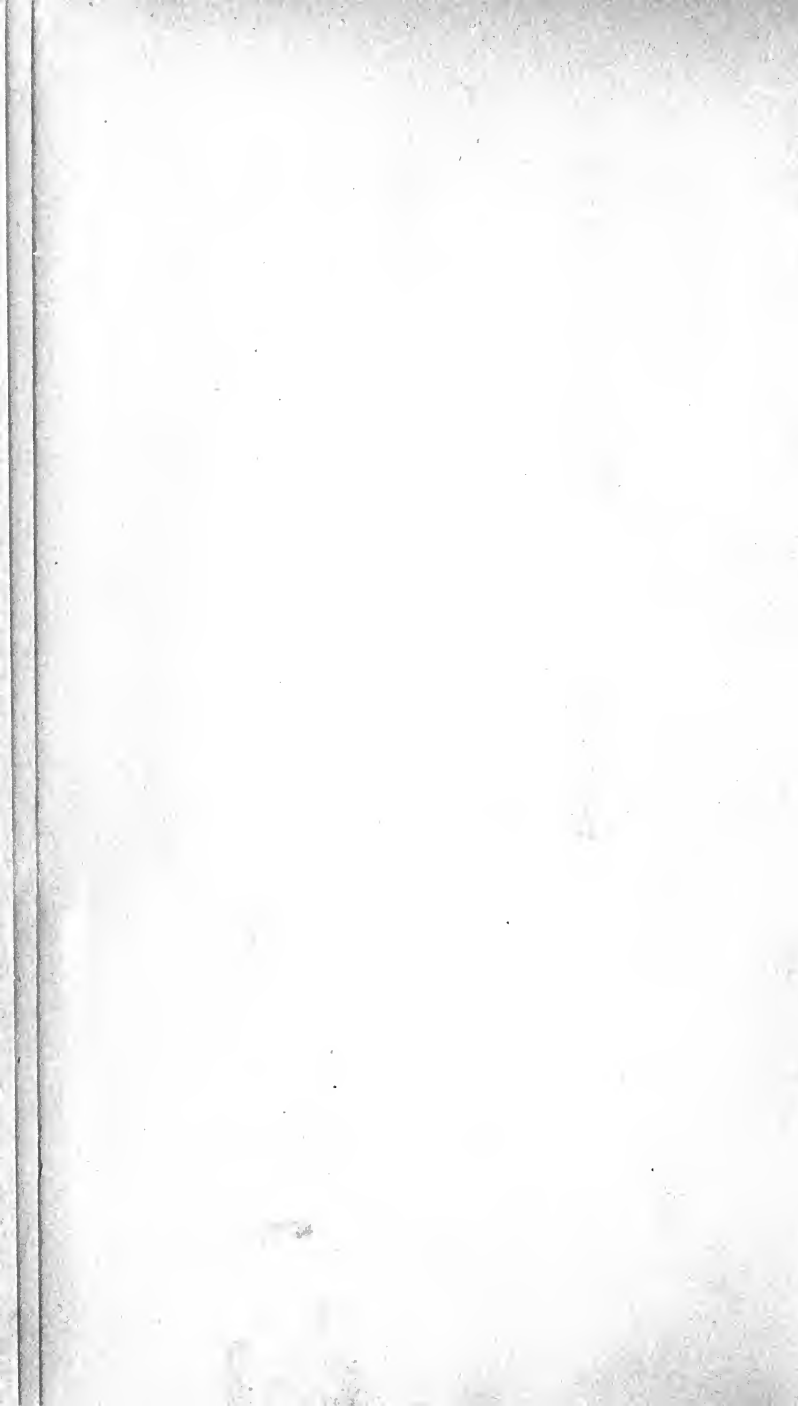
Japanese army. The details of this arrangement will be shown by the commissioners of the Japanese army.

Art. IX. The officials of the sanitary and paymaster's departments of the Russian military and naval forces in Port Arthur shall remain and continue to discharge their duties under the control of the Japanese sanitary and paymaster's departments so long as the Japanese army deems it necessary for ministering and affording sustenance to the sick, the wounded, and the prisoners.

Art. X. Detailed regulations with reference to the management of the non-combatants, the administration of the town, the performance of financial duties, the transfer of documents relating to these matters, and with reference to the carrying out of the Agreement in other respects, shall be entered in an Appendix to this Agreement. Such Appendix (a) shall have the force of the Agreement itself.

Art. XI. Each of the contracting parties shall receive one copy of this Agreement, and it shall become operative from the time of its signature.

(a) In the appendix to the terms of surrender of Port Arthur, four committees were appointed, each to secure the execution of a particular article of the Convention. The first Committee dealt with arms, ammunition, and material of war, and was subdivided into four sub-committees which settled respectively: (i) forts, batteries, arms, ammunition, etc, of the land forces; (ii) war vessels and shipping; (iii) supplies; (iv) removal of dangerous objects. The second committee dealt with personnel; the third with the sick and wounded; and the fourth with the civil administration, finances, and the civil inhabitants.—(Ariga, pp. 310-12.)











THIS BOOK IS DUE ON THE LAST DATE  
STAMPED BELOW

AN INITIAL FINE OF 25 CENTS  
WILL BE ASSESSED FOR FAILURE TO RETURN  
THIS BOOK ON THE DATE DUE. THE PENALTY  
WILL INCREASE TO 50 CENTS ON THE FOURTH  
DAY AND TO \$1.00 ON THE SEVENTH DAY  
OVERDUE.

APR 1 1942

13 Nov '57 M.H.T.

REC'D LD

NOV 4 1957

30 Mar '61 M.J.

REC'D LD

MAR 24 1961

29 Nov '62 G.P.

REC'D LD

JUL 22 '64 -5 PM

DEAD

MAY 7 1982 58

REC. CIR. MAY 25 1982

LD 21-100m-7,'39 (402s)

293767

JX 9511

P7

UNIVERSITY OF CALIFORNIA LIBRARY

